

# **SOLVING THE MYSTERY OF INSANITY LAW: ZEALOUS REPRESENTATION OF MENTALLY ILL SERVICEMEMBERS**

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The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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## **SOLVING THE MYSTERY OF INSANITY LAW: ZEALOUS REPRESENTATION OF MENTALLY ILL SERVICEMEMBERS**

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# **SOLVING THE MYSTERY OF INSANTIY LAW: ZEALOUS REPRESENTATION OF MENTALLY ILL SOLDIERS**

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**ABSTRACT:** Zealous representation of mentally ill servicemembers requires trial defense counsel to be familiar with a complex body of substantive and procedural law. Within this body of law, evidence of the accused's mental illness may be relevant in five specific areas: mental capacity to stand trial, mental responsibility for offenses, the accused's possession of criminal mens rea, the accused's commission of a voluntary act, and mitigation and extenuation of offenses. Although relevance of the accused's mental illness has deep roots in the common law, the law within the military justice system is unsettled and in need of revision and clarification.

Specifically, this paper argues that those provisions of Rule for Courts-Martial (RCM) 909 that allow for involuntary commitment of the accused prior to referral are contrary to statute and violate the Due Process Clause of the Fifth Amendment. Consequently, RCM 909 must be amended to prevent involuntary commitment of a servicemember prior to referral of charges. In addition, RCM 909 should be amended to restore the convening authority's discretion to dispose of charges as he or she sees fit, removing the rule's provisions that make commitment of a mentally incompetent servicemember mandatory.

Within the law of mental responsibility, the *Military Judges' Benchbook* defines "severe mental disease or defect" too narrowly. Instruction 6-4 excludes "non psychotic behavior disorders and personality disorders" from the definition of "severe." This exclusionary language is unsupported by Article 50a, UCMJ, and is arguably contrary to military case law. Furthermore, Instruction 6-4 should be improved by defining the key terms of the mental responsibility defense, including "appreciate," "nature and quality," and "wrongfulness."

The Military Justice Amendments of 1986, along with a recent amendment of RCM 916(k)(2), abolished the doctrine of partial mental responsibility. Nevertheless, evidence of the accused's mental illness may still be relevant to whether or not he or she possessed a criminal mens rea at the time of the offenses. This paper proposes a revised *Benchbook* instruction that removes the inapplicable standard for partial mental responsibility and clarifies the relevance of the accused's mental illness to the government's proof of mens rea.

Finally, the accused may present evidence of mental illness to demonstrate that his or her actions were involuntary. Commonly referred to as the defense of unconsciousness or automatism, neither the *Manual for Courts-Martial* nor the *Military Judges' Benchbook* contains a provision defining the defense. Evidence that the accused's actions were involuntary, whether characterized as negating the mens rea or the actus reas, undermines the government's proof of the elements. This paper proposes a new panel instruction to be given when there is evidence that the accused's actions were involuntary.

## Table of Contents

<b>I.</b>	<b>Introduction.....</b>	<b>1</b>
<b>II.</b>	<b>Mental Capacity to Stand Trial.....</b>	<b>4</b>
	A. Substantive Law Relating to Mental Capacity.....	4
	B. Procedural Rules Relating to Mental Capacity.....	13
	C. Legality of the Involuntary Commitment Provisions of RCM 909 .....	21
	D. Recommendations for Amending RCM 909 .....	35
<b>III.</b>	<b>Mental Responsibility .....</b>	<b>38</b>
	A. Substantive Provisions Relating to Mental Responsibility.....	38
	1. Defining “Severe Mental Disease or Defect” .....	42
	2. Defining “Appreciate,” “Nature and Quality,” and “Wrongfulness” .....	48
	B. Procedural Rules Relating to Mental Responsibility.....	57
	1. Pre-trial and Trial Procedures .....	57
	2. Procedures Following Acquittal Due to Lack of Mental Responsibility....	60
<b>IV.</b>	<b>Evidence Negating Mens Rea v. Partial Mental Responsibility .....</b>	<b>67</b>
	A. History of the Doctrine of Partial Mental Responsibility .....	67
	B. Partial Mental Responsibility after <i>Ellis v. Jacob</i> .....	74
	C. Proposed Changes to the <i>Military Judges’ Benchbook</i> .....	77
<b>V.</b>	<b>Evidence Relevant to Voluntary Act (Unconsciousness / Automatism).....</b>	<b>80</b>
	A. History of Unconsciousness (Automatism) in Military Case Law .....	83
	B. A Proposed Instruction for Evidence of an Involuntary Act .....	87
<b>VI.</b>	<b>Evidence Offered in Mitigation or Extenuation.....</b>	<b>88</b>
<b>VII.</b>	<b>Conclusion .....</b>	<b>94</b>
	<b>Appendix A – RCM 909 Involuntary Commitment Amendments.....</b>	<b>A-1</b>
	<b>Appendix B – Instruction 6-4 Mental Responsibility Amendments.....</b>	<b>B-1</b>
	<b>Appendix C – Evidence Negating Mens Rea Amendments .....</b>	<b>C-1</b>
	<b>Appendix D – Instruction for Evidence Negating a Voluntary Act .....</b>	<b>D-1</b>

## I. Introduction

One of the most challenging tasks facing trial defense counsel is representing a mentally ill servicemember. Regardless of whether the government is considering administrative action, nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ),<sup>1</sup> or a court-martial, fully advising the mentally ill servicemember requires a comprehensive understanding of procedural and substantive laws that are often unique, and sometimes even arcane in interpretation and application. While many of the common legal issues are covered during basic criminal law instruction, such as capacity to stand trial and mental responsibility for offenses,<sup>2</sup> others remain obscure. Some examples include the consequences to the accused of a finding of mental incapacity or lack of mental responsibility, the practical meaning of the terms found within the lack of mental responsibility defense, and the impact of mental illness on an accused's ability to form mens rea. The complexity of potential issues that arise for the judge advocate representing a mentally ill servicemember can, under some circumstances, become overwhelming.

Adding to the complexity, mental illness can be relevant to many aspects of criminal procedure. Mental illness is legally relevant to mental capacity to stand trial,<sup>3</sup> mental

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<sup>1</sup> UCMJ art. 15 (2002).

<sup>2</sup> See, e.g., CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, ONE HUNDRED SIXTY-SIXTH JUDGE ADVOCATE OFFICER BASIC COURSE tab V (Jan. – Apr. 2005).

<sup>3</sup> Rule for Courts-Martial 909(a) states:

No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

responsibility,<sup>4</sup> possession of criminal mens rea,<sup>5</sup> commission of a voluntary act,<sup>6</sup> and mitigation or extenuation of offenses.<sup>7</sup> For the majority of practitioners, who only rarely encounter mental illness as an issue in a case, understanding and applying the legal standards within each of these areas is a significant challenge. Of even greater difficulty is identifying the legal ambiguities within each area that create opportunities for creative and zealous advocacy.

The law within the military justice system as it applies to mental illness is unsettled and in immediate need of revision and clarification. These changes are necessary to correct constitutional due process concerns, as well as to ensure that mentally ill servicemembers receive a fair trial with a reliable outcome. In particular, the rules allowing for the accused's involuntary commitment because of the lack of mental capacity prior to referral of charges

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MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 909(a) (2002) [hereinafter MCM].

<sup>4</sup> Article 50a(a), UCMJ, states:

It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

UCMJ art. 50a(a). *See* MCM, *supra* note 3, R.C.M. 916(k)(1) (containing language nearly verbatim to Article 50a(a), UCMJ).

<sup>5</sup> *See, e.g., Ellis v. Jacob*, 26 M.J. 90, 93 (C.M.A. 1988) ("Thus Article 50a(a), like its model, does not bar appellant from presenting evidence in support of his claim that he lacked specific intent to kill at the time of his offense.").

<sup>6</sup> *See, e.g., United States v. Berri*, 33 M.J. 337, 341 (C.M.A. 1991) ("What the status of unconsciousness might be under the Uniform Code of Military Justice, we do not decide here.").

<sup>7</sup> *See* MCM, *supra* note 3, R.C.M. 1001(c)(1) ("The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.").

are contrary to statute and violate the Due Process Clause;<sup>8</sup> the trial instructions for lack of mental responsibility found in the *Military Judges' Benchbook* contain an overly restrictive definition for "severe mental disease or defect," making them an incorrect statement of the law;<sup>9</sup> the *Benchbook* instructions for the doctrine of partial mental responsibility are reflective of an older body of law made inapplicable by statute, executive order, and judicial precedent;<sup>10</sup> and, although undefined, the defense of automatism exists within the military justice system and needs to be included in the *Benchbook*.<sup>11</sup> Where appropriate, this paper proposes amendments to the Rules for Courts-Martial and new or revised trial instructions.

In addition to the primary purpose of identifying and arguing the validity of the four proposals listed above, this paper has the secondary purpose of providing defense counsel with a resource that clearly explains the substantive law and significant procedural rules that apply when representing a mentally ill servicemember. Beginning first with the topic of mental capacity, the paper continues with mental responsibility, evidence negating mens rea, evidence negating voluntary act, and, finally, evidence in mitigation and extenuation. A detailed discussion of the four proposals listed in the preceding paragraph is embedded within the broader review of the law as it applies to mentally ill defendants. This structure

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<sup>8</sup> See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."). A proposed amendment of Rule for Courts-Martial (RCM) 909 is contained in Appendix A.

<sup>9</sup> See U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK para. 6-4 (15 Sept. 2002) [hereinafter BENCHBOOK]. The complete text of instruction 6-4, titled Mental Responsibility at Time of Offense, is contained in Appendix B, along with a proposed amendment.

<sup>10</sup> *Id.* paras. 5-17, 6-5. The complete text of instruction 5-17, titled Evidence Negating Mens Rea, is contained in Appendix C, along with a proposed amendment.

<sup>11</sup> See *infra* Part V. A proposed Benchbook instruction 5-17a, titled Evidence Negating Voluntary Act, is contained in Appendix D.

provides both context and meaning to the proposals themselves, and will orient the practitioner to the applicable statutes, rules, and case law for each area of the law.

## II. Mental Capacity to Stand Trial

### A. Substantive Law Relating to Mental Capacity

In accordance with Rule for Courts-Martial (RCM) 909(a), no servicemember may be brought to trial by court-martial “if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them [sic] or to conduct or cooperate intelligently in the defense of the case.”<sup>12</sup> This standard remains essentially unchanged from the 1969 *Manual for Courts-Martial*<sup>13</sup> and mirrors that applied in federal courts.<sup>14</sup> The requirement that an accused be mentally competent at the time he faces court-martial has firm roots in both military law<sup>15</sup> and the Due Process Clause of the Constitution.<sup>16</sup>

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<sup>12</sup> MCM, *supra* note 3, R.C.M. 909(a). The terms “mental capacity” and “mental competence” are used interchangeably within this paper and throughout many of the cited sources.

<sup>13</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 120d (Rev. 1969) [hereinafter 1969 MCM] (“No person should be brought to trial unless he possesses sufficient mental capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.”).

<sup>14</sup> *Id.* R.C.M. 909 analysis, at A21-58. The standard for mental capacity applied in federal courts is found in 18 U.S.C. § 4241(d).

<sup>15</sup> See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 393 (2d ed. 1920 reprint).

Where the fact is shown in evidence, or developed upon the trial, that the accused has become insane since the commission of the offense, here also the court will most properly neither find nor sentence, but will communicate officially to the convening authority the testimony or circumstances and its action thereon, and adjourn to await orders.

*Id.*

Structurally, the standard for mental capacity contains three key elements: (1) mental disease or defect; (2) ability to understand the nature of the proceedings; and (3) ability to conduct or cooperate intelligently in the defense of the case.<sup>17</sup>

The first element requires that the accused be suffering from a mental disease or defect at the time of trial.<sup>18</sup> Practically speaking, the relevant time period begins prior to the beginning of trial because the accused must be mentally competent to assist in preparation of the case. Although RCM 909 does not expressly define “mental disease or defect,” the Court of Appeals for the Armed Forces (CAAF), and its predecessor, the Court of Military Appeals (COMA), both interpreted the term broadly. In *United States v. Proctor*,<sup>19</sup> the COMA reviewed a military judge’s decision that the accused possessed sufficient mental capacity to stand trial.<sup>20</sup> Prior to trial, a sanity board diagnosed the accused with both pedophilia and a personality disorder.<sup>21</sup> The defense alleged that the personality disorder, which manifested itself through the accused’s delusions that he spoke directly with God and that “God would deliver him from being sentenced,”<sup>22</sup> rendered the accused “mentally incapable of

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<sup>16</sup> See *Medina v. California*, 505 U.S. 437, 439 (1992) (“It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial.”). See also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (applying Fourteenth Amendment due process jurisprudence to the federal government via the Due Process Clause of the Fifth Amendment).

<sup>17</sup> MCM, *supra* note 3, R.C.M. 909(a).

<sup>18</sup> *Id.*

<sup>19</sup> 37 M.J. 330 (C.M.A. 1993).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 331.

<sup>22</sup> *Id.* at 337.

participating intelligently in his defense.”<sup>23</sup> In its analysis, the court noted with approval that the military judge gave the accused the benefit of a broad interpretation of “mental disease or defect.”<sup>24</sup> Citing to *United States v. Benedict*,<sup>25</sup> the court reiterated that even the more stringent insanity defense standard of “severe mental disease or defect” had never been interpreted to require the accused to suffer from a psychosis.<sup>26</sup> Ultimately, the court concluded that the military judge’s finding of mental competence was not clearly erroneous.<sup>27</sup>

More recently, the CAAF addressed whether an accused suffering from amnesia is capable of assisting in his own defense.<sup>28</sup> In *United States v. Barreto*,<sup>29</sup> a sanity board diagnosed the accused as suffering from anterograde and retrograde amnesia,<sup>30</sup> a condition that resulted in his complete inability to recall the automobile accident underlying the

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<sup>23</sup> *Id.* at 335.

<sup>24</sup> *Id.* at 336. Although the trial judge considered personality disorders as “technically” meeting the definition of mental disease or defect for the purpose of his analysis, he noted on the record that he did not believe the accused actually suffered from a mental disease or defect. *Id.* at 334. Regardless of the judge’s misgivings, the COMA seems to have approved of his giving the accused the benefit of the doubt.

<sup>25</sup> 27 M.J. 253 (C.M.A. 1988).

<sup>26</sup> 37 M.J. at 336.

<sup>27</sup> *Id.* at 337.

<sup>28</sup> See *United States v. Barreto*, 57 M.J. 127 (2002).

<sup>29</sup> *Id.*

<sup>30</sup> Amnesia is defined as a “disturbance in the memory of information stored in long-term memory, in contrast to short-term memory, manifested by total or partial inability to recall past experiences.” *STEDMAN’S MEDICAL DICTIONARY* 58 (25th ed. 1990). Anterograde refers to “events occurring after the trauma or disease that caused the condition.” *Id.* Retrograde refers to “events that occurred before the trauma or disease that caused the condition.” *Id.*

offenses charged.<sup>31</sup> The defense asserted that the accused's inability to remember the critical events surrounding the alleged offense made him incapable of assisting in his own defense because he could neither relate the facts to his counsel nor testify in his own behalf.<sup>32</sup> Without addressing whether amnesia was a "mental disease or defect" within the context of RCM 909(a), the court analyzed whether the accused was capable of assisting in his own defense.<sup>33</sup> Although not stated expressly, the court seemed to accept without debate that the diagnosis of amnesia qualified as a "mental disease or defect."

To decide whether the accused was capable of assisting in his own defense, the court relied heavily upon a six-factor test used by the U.S. Court of Appeals for the District of Columbia Circuit in *Wilson v. United States*.<sup>34</sup> Those six factors are:

(1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer. (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf. (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi. (4) The extent to which the Government assisted the defendant and his counsel in that reconstruction. (5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that

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<sup>31</sup> 57 M.J. at 129 n.1. Senior Airman Barreto pleaded guilty to reckless driving and negligent homicide. *Id.* at 128. At the time of the offenses, SA Barreto was driving his privately owned automobile on winding two-lane highway in Germany. *Id.* After exceeding the posted speed limit of 100 kilometers per hour in an effort to pass four cars, SA Barreto lost control of his vehicle on a curve and careened into oncoming traffic. The accident resulted in the death of SA Barreto's passenger, and the serious injury of SA Barreto and two other people.

<sup>32</sup> *Id.* at 129.

<sup>33</sup> *Id.* at 129-30.

<sup>34</sup> 57 M.J. at 131 (citing *United States v. Wilson*, 391 F.2d 460 (D.C. Cir. 1968)).

he would have been able to do so. (6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.<sup>35</sup>

Applying the facts of the case, the court emphasized that Barreto's automobile accident could be reconstructed by use of extrinsic evidence, that the government assisted the defense in that reconstruction, and that the strength of the government's case was such that any reasonable hypotheses of innocence was excluded.<sup>36</sup> On this analysis, the court concluded that the military judge had not erred in finding that the accused had the capacity to stand trial.<sup>37</sup> Had the facts of the case been different, however, it is reasonable to conclude that the court might have found amnesia to result in a lack of mental capacity. This conclusion is strongly supported by the court's reliance upon the fifth *Wilson* factor, which expressly reserves the possibility that amnesia could interfere with the accused's ability to present a viable defense, such as alibi.<sup>38</sup> Although the court declined to adopt the *Wilson* factors as a test to be used in all cases involving amnesia,<sup>39</sup> the court's reliance upon those factors as a means of determining whether amnesia might result in a lack of capacity strongly indicates that the CAAF would uphold such a finding under the right circumstances.

The *Proctor* and *Barretto* decisions, taken together, show that the meaning of "mental disease or defect" within the context of RCM 909 is extremely broad, potentially encompassing any mental condition that might have the effect of rendering the accused

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<sup>35</sup> 391 F.2d at 463-64 (citations omitted).

<sup>36</sup> 57 M.J. at 131.

<sup>37</sup> *Id.* at 127.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 131 n.4.

incapable of either understanding the nature of the proceedings or assisting in his own defense.<sup>40</sup> In both cases, the court tacitly declined to limit the doctrine to any particular mental illness, choosing instead to focus on the effect of the mental disorder rather than its severity. This conclusion is consistent with the Supreme Court's decision in *United States v. Drope*,<sup>41</sup> in which the Court stated that the prohibition against trying the mentally incompetent "is fundamental to an adversary system of justice."<sup>42</sup> The requirement that the accused be mentally competent to stand trial can be understood "as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."<sup>43</sup> The analogy to trials *in absentia* highlights the significance of the effect, or impact, of the mental condition, rather than its cause or severity. In other words, the success of the adversarial system depends upon the participation of the defendant, both physically and mentally. The lesson for defense counsel is that, while the severity of a mental illness is certainly important, the doctrine of mental capacity hinges more on the illness's effect on the accused's ability to understand the proceedings and participate in the defense.

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<sup>40</sup> Although lacking direct precedential value with regard to the current language in RCM 909(a), the Coast Guard Board of Review stated in *United States v. Victor*, 36 C.M.R. 814 (C.G.B.R. 1966), that "there is no requirement that incapacity be the result of a mental disease, defect or derangement as in the case of insanity at the time of the crime." *Id.* at 816. The board relied upon the same foundational case law that supports current law on mental capacity, namely *Dusky v. United States*, 362 U.S. 402 (1960). *Id.* at 818.

<sup>41</sup> 420 U.S. 162 (1975).

<sup>42</sup> *Id.* at 172.

<sup>43</sup> *Id.* (citing Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)).

The second and third elements of the mental capacity standard are disjunctive. That is, the accused must only prove that his “mental disease or defect” has resulted in either an inability to understand the nature of the proceedings or an inability to conduct or cooperate intelligently in the defense of the case.<sup>44</sup> Once again, RCM 909 does not articulate what facts meet this standard. In *Proctor*, discussed previously, the COMA essentially adopted the constitutional standard articulated by the Supreme Court in *United States v. Dusky*.<sup>45</sup> The accused must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as factual understanding of the proceedings against him.”<sup>46</sup> Elaborating further, the COMA said:

[T]he accused “must be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense. . . .”<sup>47</sup>

Although this language provides considerably more guidance than RCM 909’s more cursory language, the practitioner is still left with only a vague idea as to what facts must be proven to support a finding of mental incapacity. As shown by the analysis in *United States v.*

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<sup>44</sup> MCM, *supra* note 3, RCM 909(a).

<sup>45</sup> *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citing *United States v. Williams*, 17 C.M.R. 197, 204 (C.M.A. 1954)).

*Wilson*, discussed above, a court's determination as to whether an accused possesses mental capacity to stand trial is based largely upon the factual evidence presented at trial.<sup>48</sup>

As a practical matter, the facts upon which the court will rely come primarily from mental health professionals. Rule for Courts-Martial 706 creates a mechanism that allows the trial counsel, defense counsel, and others involved in the case, to request an inquiry into the accused's mental capacity when warranted by the evidence.<sup>49</sup> While the RCM 706 inquiry, also referred to as a sanity board, generally results in the primary evidence that will be considered by the military judge before ruling on the issue of capacity,<sup>50</sup> defense counsel may wish to question the client on their own. Under these circumstances, one commentator has suggested the following questions:

1. Does the client understand the roles of the major participants in the adversary process?
2. Does the client appreciate defense counsel's function and is he capable of trusting and working with counsel?
3. Does the client recognize the difference between a guilty plea and a trial?

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<sup>48</sup> See *supra* note 34 and accompanying text.

<sup>49</sup> Rule for Courts-Martial 706(a) states:

If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused

MCM, *supra* note 3, R.C.M. 706(a).

<sup>50</sup> See, e.g., *United States v. Collins*, 41 M.J. 610, 612 (C.M.A. 1994) (holding that a military judge cannot rule finally on the question of mental capacity without considering the results of an RCM 706 inquiry, or an adequate substitute).

4. Is the client aware of the nature of the charges he faces, the seriousness of such charges, and the possible consequences?
5. Is the client capable of discussing the factual basis of the charges, possible defenses, and problems with accounts given by prosecution witnesses?
6. Can the client testify in a relevant, coherent manner?
7. Is the client able to discuss likely outcomes and make choices regarding plea options or defense strategy?
8. Can the client control his motor and verbal behavior to the extent that court proceedings will not be disrupted?<sup>51</sup>

The content of these questions gives substance to the legal standard articulated in *Proctor*.

While the sanity board will likely ask very similar questions, only the defense counsel has the ability to assess whether or not the accused is truly able to assist in the defense of the case over a longer period of time. Unlike the members of a sanity board, who may observe the accused for only a handful of hours, the defense counsel works with the accused on a regular basis over an extended period of time. Ultimately, the defense counsel should fall back on the very simple question of whether the client's mental condition is interfering with the normal attorney-client relationship.<sup>52</sup> If the answer to this question is yes, then the defense may have a colorable argument that the accused lacks capacity to stand trial.<sup>53</sup>

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<sup>51</sup> Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 99 (1988) (citations omitted).

<sup>52</sup> See Uphoff, *supra* note 51, at 69. A normal attorney-client relationship may be defined as a relationship in which the client is able to understand his or her attorney's advice and make reasoned decisions based upon that advice.

<sup>53</sup> This last sentence should not be construed as an argument that defense counsel should raise the issue of mental capacity at every opportunity. Because involuntary commitment, like confinement, involves a serious deprivation of liberty, an accused servicemember may regard commitment to the custody of the Attorney General, although referred to kindly as "hospitalization," as no better than being in pretrial confinement. On the other hand, some clients may welcome the opportunity to receive free mental health care from the federal government, while at the same time drawing their full military salary. Given the potential for minor charges to be preferred and referred to trial by court-martial, whether from the outset or following an offer of punishment

## B. Procedural Rules Relating to Mental Capacity

Turning from the substantive law to the procedural law, the first thing to note is that “[t]he mental capacity of the accused is an interlocutory question of fact” determined by the military judge.<sup>54</sup> An accused is presumed to possess mental capacity unless the contrary is established by a preponderance of the evidence.<sup>55</sup> In general, the accused has both the responsibility of raising the issue, usually in the form of a motion for appropriate relief,<sup>56</sup> and the burden of persuading the military judge.<sup>57</sup> Normally, the issue of mental capacity arises in the early stages of trial, raised either directly with the convening authority prior to referral

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under Article 15, UCMJ, it is certainly possible that the costs of pretrial hospitalization might outweigh the benefits of seeing the case through to trial and sentencing. Defense counsel should be aware of not only the costs to his own client, but also those to the government, which include the financial and administrative costs of coordination, transportation, hospitalization, and treatment of the accused. On top of these direct costs are the intangible costs associated with having a mentally ill servicemember remain assigned to an active military unit. Not only does the accused’s duty position go unfilled by a suitable replacement, but the unit leadership must also continue to take care of the administrative details of the servicemember’s pending court-martial. *See also* Uphoff, *supra* note 51 (providing an excellent discussion of the pragmatic considerations that impact the representation of a mentally ill client).

<sup>54</sup> MCM, *supra* note 3, R.C.M. 909(b).

<sup>55</sup> Rule for Courts-Martial 909(e)(2) states:

Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case.

*Id.* R.C.M. 909(e)(2).

<sup>56</sup> MCM, *supra* note 3, R.C.M. 906(b)(14). *See* DAVID A. SCHLEUTER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 13-5(A) (5th ed. 1999). When the defense makes a motion for appropriate relief, the specific relief requested is for the military judge to conduct a competence determination hearing in accordance with RCM 909. If the military judge finds that the accused lacks mental capacity, he should grant a stay of the proceedings and then forward a report of his findings to the general court-martial convening authority. *See* BENCHBOOK, *supra* note 9, para. 6-2.

<sup>57</sup> MCM, *supra* note 3, R.C.M. 904(c)(2)(A). *See also* *Medina v. California*, 506 U.S. 437 (1992) (holding that the Due Process Clause is not violated by a rule placing the burden of proof on the defendant to prove incompetence by a preponderance of the evidence).

or with the military judge after referral.<sup>58</sup> However, because the accused's mental capacity is directly related to the accuracy and fairness of the judicial process, the defense and the court may raise the issue of mental capacity at any stage of trial, including the appellate process.<sup>59</sup>

In those cases where an RCM 706 inquiry conducted prior to referral results in a finding that the accused lacks mental capacity, RCM 909(c) requires the convening authority, if he agrees with the report, to forward the charges to the next higher convening authority.<sup>60</sup> Assuming each of the subordinate convening authorities agrees with the sanity board, the charges will eventually reach the general court-martial convening authority, who "shall" commit the accused to the custody of the attorney general.<sup>61</sup> The attorney general is then

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<sup>58</sup> *Id.* R.C.M. 909(c), (d).

<sup>59</sup> *See, e.g.,* *Drope v. Missouri*, 420 U.S. 162, 181 (1975) ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); *United States v. Thomas*, 34 M.J. 788, 792 (A.C.M.R. 1992) (setting aside the findings and sentence after determining that the appellant was mentally incompetent at the time of trial and not mentally responsible for the offenses charged); MCM, *supra* note 3, R.C.M. 1107(b)(5) (prohibiting the convening authority from approving a sentence if the accused lacks mental capacity); *id.* R.C.M. 1203(c)(5) (prohibiting an appellate authority from affirming court-martial proceedings while the accused lacks mental capacity, and providing a mechanism for requesting a post-trial RCM 706 inquiry).

<sup>60</sup> Rule for Courts-Martial 909(c) states:

*Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

MCM, *supra* note 3, R.C.M. 909(c).

<sup>61</sup> *Id.*

required to hospitalize the accused without any provision for a judicial hearing.<sup>62</sup> Only in the case where the general court-martial convening authority disagrees with the findings of the sanity board will he maintain the normal wide discretion to dispose of the charges as deemed appropriate.<sup>63</sup>

The provisions of RCM 909(c) result in a substantial loss of discretion for convening authorities at all levels who normally have complete authority to dismiss charges, forward them to a higher commander, or refer them to court-martial.<sup>64</sup> Not only is the accused involuntarily committed without receiving a hearing,<sup>65</sup> but the general court-martial convening authority, along with his subordinate convening authorities, lose their wide discretion to act upon charges when a sanity board finds that an accused lacks mental capacity.<sup>66</sup> This consequence arises even when the charges are minor or the government's case is weak, issues that are significant for at least two reasons. First, from the convening authority's perspective, these two criteria may weigh in favor of alternate disposition. If the charges are relatively minor or the government's case is weak, then the high cost of

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<sup>62</sup> *Id.* R.C.M. 909(f) ("An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in Section 4241(d) of title 18, United States Code.").

<sup>63</sup> *Id.* R.C.M. 909(c) ("If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.").

<sup>64</sup> *Id.* R.C.M. 401(c).

<sup>65</sup> *Id.* R.C.M. 909(c); 18 U.S.C. § 4241(d) ("The Attorney General shall hospitalize the defendant in a suitable facility . . .").

<sup>66</sup> As noted earlier, the convening authority is not required to commit the accused to the custody of the Attorney General if he does not concur with the sanity board's findings. Applying the rule in good faith would require that the convening authority have a legitimate reason to doubt the professional opinion of the sanity board, rather than a pragmatic reason for avoiding the consequences of applying R.C.M. 909(c) as it is written.

involuntary commitment, which includes both human and pecuniary costs,<sup>67</sup> might easily be outweighed by the convenience of administrative discharge. Second, from the accused's perspective, these two criteria will be important considerations in determining whether to contest the charges on the merits. When the Attorney General involuntarily hospitalizes a service member prior to referral, the accused is denied the ability to contest both the appropriateness of the commitment and the validity of the allegations. In the case of minor offenses, the accused may be hospitalized for a period longer than if he were confined after being convicted at trial. Defense counsel should, therefore, avoid the impulse to embrace a finding of mental incapacity as a way to avoid or delay possible conviction, looking instead to the overall interests of their client.

After referral of charges, the issue of mental capacity may be raised by either party, *sua sponte* by the military judge, or by an RCM 706 inquiry.<sup>68</sup> If an RCM 706 inquiry, conducted before or after referral, concludes that the accused lacks capacity to stand trial, then "the military judge *shall* conduct a hearing to determine the mental capacity of the accused."<sup>69</sup> At the incompetence determination hearing, as it is referred to by RCM 909, the

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<sup>67</sup> The human costs referred to in this paragraph include the time and effort of the trial counsel in preparing the case and litigating the accused's mental capacity, the time and effort of the service members in the accused's command who will likely be responsible for making his transfer to the Attorney General, and the time and effort of the numerous individuals employed by the Department of Justice and the Bureau of Prisons in dealing with the accused's transportation and treatment. The financial costs include the expenses of transportation, payment of salaries to all individuals who will be dealing with the accused's case rather than some other official duty, and the salaries of the physicians and other medical personnel who will tend to the accused during the period of hospitalization.

<sup>68</sup> *Id.* R.C.M. 909(d).

<sup>69</sup> *Id.* Other than this one clause referring to the types of evidence the military judge may consider, RCM 909 does not prescribe any additional procedures to be followed by the military judge in conducting the incompetence determination hearing.

only applicable rules of evidence are those concerning privileges.<sup>70</sup> If the military judge determines that the accused is not mentally competent, then he must report this result to the general court-martial convening authority, “who shall commit the accused to the custody of the Attorney General.”<sup>71</sup> As with the situation when mental capacity is found to be lacking prior to referral and the general court-martial convening authority agrees, RCM 909 mandates the accused’s commitment to the Attorney General. The real difference between pre- and post-referral procedures, which is significant in terms of the accused’s due process rights, is that after referral, the military judge is required to conduct an adversarial hearing before making a finding of incompetence.<sup>72</sup>

Once the accused has been hospitalized by the Attorney General, the procedures of 18 U.S.C. § 4241(d) control.<sup>73</sup> The accused will remain hospitalized until medical personnel make a determination whether the accused is likely to regain competency within a foreseeable period of time.<sup>74</sup> Although this period initially is limited to four months, the

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<sup>70</sup> *Id.* R.C.M. 909(e)(2).

<sup>71</sup> *Id.* R.C.M. 909(e)(3).

<sup>72</sup> Interestingly, if a sanity board conducted after referral finds an accused to be mentally incompetent, the general court-martial convening authority could theoretically avoid the burden of an incompetence determination hearing by withdrawing the referred charges, rather than immediately submitting the sanity board report with the court. Once the charges were withdrawn, the accused could be immediately turned over to the Attorney General under the provisions of RCM 909(c). This hypothetical scenario seems implausible if one assumes that the government is anxious to proceed to trial, in which case the opportunity to litigate the accused’s lack of capacity in front of the court might be welcomed. In the case where the government is not anxious to get to trial, for whatever reason, there is the possibility that the provisions of RCM 909 could be abused.

<sup>73</sup> UCMJ art. 76b(a)(2) (2002).

<sup>74</sup> Section 4241(d)(1) states, in part, that:

The Attorney General shall hospitalize the defendant for treatment in a suitable facility—(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine

accused may remain for a longer period of time if there is a substantial probability that he will regain competency within that period.<sup>75</sup> If the accused regains his mental capacity to stand trial, either through treatment or otherwise, then the general court-martial convening authority, after receiving notification, must promptly take custody of the accused.<sup>76</sup> On the other hand, if the accused does not regain mental capacity by the end of the hospitalization period described above, then he will be returned to the custody of the general court-martial convening authority.<sup>77</sup> At this point, the general court-martial convening authority must order a hearing to determine whether the accused should be released.<sup>78</sup> At the hearing, the military judge will determine whether the accused's release would pose a substantial threat to either people or property.<sup>79</sup> If the military judge finds by clear and convincing evidence that

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whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and (2) for an additional reasonable period of time until—(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or (B) the pending charges against him are disposed of according to law; whichever is earlier.

*Id.* At least three federal circuit courts of appeals have found the mandatory commitment provisions of § 4241(d) to be constitutional. *See* *United States v. Filippi*, 211 F.3d 649 (1st Cir. 2000); *United States v. Donofrio*, 896 F.2d 1301 (11th Cir. 1990); *United States v. Shawar*, 865 F.2d 856 (7th Cir. 1989).

<sup>75</sup> 18 U.S.C. § 4241(d).

<sup>76</sup> UCMJ art. 76b(a)(4).

<sup>77</sup> 18 U.S.C. § 4241(d).

<sup>78</sup> UCMJ art. 76b(a)(5) ("In the application of section 4246 of title 18 to a case under this subsection, references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person.").

<sup>79</sup> 18 U.S.C. § 4246(d). Section 4246(d) states:

If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General.

the accused's release would pose such a threat, then commitment to the Attorney General is made indefinitely.<sup>80</sup> In the circumstance where the accused's hospitalization occurred prior to referral of charges, Article 76b, UCMJ, does not create any procedure by which the convening authority may hold a hearing.<sup>81</sup> In the absence of a military judge to conduct the hearing, the convening authority may unilaterally determine whether the accused should be released or hospitalized.<sup>82</sup> As will be argued below, this procedural gap is strong evidence that the drafters of Article 76b, UCMJ, did not intend for accused servicemembers to be hospitalized by the Attorney General prior to referral of charges.<sup>83</sup> At a minimum, the

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*Id.* The legal standard for indefinite commitment contained in § 4646(d), including the government's burden of proving dangerousness by clear and convincing evidence, is consistent with the Supreme Court's decision in *Addington v. Texas*, 441 U.S. 418 (1979).

<sup>80</sup> *Id.* § 4646(d) (“[T]he Attorney General shall hospitalize the person for treatment in a suitable facility, until . . . the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another.”).

<sup>81</sup> UCMJ art. 76b(a)(5) (“In the application of section 4246 of title 18 to a case under this subsection, references to the court that ordered commitment of a person . . . shall be deemed to refer to the general court-martial convening authority for that person.”).

<sup>82</sup> The Air Force Court of Criminal Appeals is the only military appellate court that has interpreted RCM 909(c). In *United States v. Salahuddin*, the petitioner was charged with three specifications in violation of Article 134. 54 M.J. 918, 919 (A.F. Ct. Crim. App. 2001). Prior to referral, the special court-martial convening authority, at the request of the defense counsel, ordered an RCM 706 inquiry. *Id.* Following receipt of the sanity board's finding that MSG Salahuddin lacked mental capacity due to “neuropsychological deficits,” the general court-martial convening authority committed the appellant to the custody of the Attorney General. *Id.* Because commitment occurred prior to referral, the appellant did not receive a hearing in front of a military judge. The court denied a defense request for either (1) a writ of mandamus ordering that the accused be granted a hearing before a military judge or (2) an order quashing the convening authority's order to commit the accused to the custody of the attorney general. *Id.* Avoiding the issue of whether the All Writs Act provided jurisdiction, the court held that the petitioner was not entitled to relief. *Id.* at 920. The *Salahuddin* court gave the language of Article 76b, UCMJ, and RCM 909, its literal interpretation, finding that both the statute and the rule afforded no discretion to the convening authority. *Id.* The court did not address either of the issues argued in this paper. The Court of Appeals for the Armed Forces (CAAF) denied a petition for writ appeal. *United States v. Salahuddin*, 54 M.J. 456 (2001).

<sup>83</sup> See *infra* note 99 and accompanying text.

drafters probably did not foresee the possibility of a servicemember being hospitalized indefinitely without ever receiving any form of judicial review.

If, after referral, the military judge finds that the accused is competent to stand trial, the accused must generally proceed to trial and raise the issue on appeal.<sup>84</sup> During the appellate process, the military judge's decision on an interlocutory question of fact will not be overturned unless clearly erroneous.<sup>85</sup> If the accused prevails on appeal, however, the findings will usually be reversed, and the accused will be entitled to a new trial, assuming he has regained mental capacity.<sup>86</sup>

The final provision of RCM 909 is noteworthy in that it excludes all periods of hospitalization by the Attorney General from the 120-day time period found in RCM 707.<sup>87</sup> This provision is clearly more favorable to the government than the accused, primarily because it provides an additional 120 days after the accused is released from commitment, rather than more appropriately tolling the 120-day clock. In other words, the 120-day clock

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<sup>84</sup> See UCMJ art. 66; MCM, *supra* note 3, R.C.M. 1203.

<sup>85</sup> *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993). *Cf. United States v. Collins*, 60 M.J. 261 (2004) (Crawford, C.J., concurring).

<sup>86</sup> See *Drope v. Missouri*, 420 U.S. 162 (1975) (holding that an attempt to conduct an after-the-fact inquiry into the accused mental capacity at the time of trial would not be adequate to protect the appellant's due process rights); *United States v. Thomas*, 34 M.J. 788 (A.C.M.R. 1992) (setting aside the findings and sentence after determining that the accused lacked capacity at the time of trial). See also *United States v. Collins*, 41 M.J. 610, 613 (Army Ct. Crim. App. 1994) (returning the case to the Judge Advocate General without reversing it, and directing that the military judge order an RCM 706 inquiry to determine mental capacity of the appellant at the time of trial).

<sup>87</sup> MCM, *supra* note 3, R.C.M. 909(g) ("All periods of commitment shall be excluded as provided by R.C.M. 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment."). See *id.* R.C.M. 707(b)(3)(E) (containing a parallel provision regarding the 120-day time limit).

is reset to zero following the accused's release from commitment. Defense counsel should note that RCM 909 does not mention any other speedy trial rights held by the accused, including those under Article 10, UCMJ,<sup>88</sup> or the Sixth Amendment to the Constitution.<sup>89</sup> Although Article 10, UCMJ, does not apply directly to a case of involuntary hospitalization due to mental illness, it may still apply to a given case if the accused has been placed in pretrial confinement either before or after the period of hospitalization. Because of this omission, the defense may still have an argument that an accused subjected to pretrial confinement has been deprived of his Article 10 right to a speedy trial, even if the government has not violated the 120-day clock provided by RCM 707.<sup>90</sup>

#### C. Legality of the Involuntary Commitment Provisions of RCM 909

Under the circumstances described above, RCM 909(c) requires the general court-martial convening authority to commit an accused to the Attorney General without providing any meaningful procedural rights to contest the findings of the sanity board.<sup>91</sup> Specifically, the accused may be directed to undergo an RCM 706 inquiry at which he has no right to

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<sup>88</sup> UCMJ art. 10. *See also* United States v. Cooper, 58 M.J. 54 (2003); United States v. Birge, 52 M.J. 209, 211 (1999) (reiterating that the standard for compliance with Article 10 is whether the government acted with due diligence in prosecution of the case).

<sup>89</sup> U.S. CONST. amend. VI. *See also* Barker v. Wingo, 407 U.S. 514 (1972) (articulating the legal standard for the government's compliance with the Speedy Trial Clause of the Sixth Amendment).

<sup>90</sup> *See Cooper*, 58 M.J. at 59 (2003) (holding that the protections afforded by Article 10, UCMJ, extend beyond those provided by RCM 707).

<sup>91</sup> *See supra* notes 61-64 and accompanying text.

representation,<sup>92</sup> no right to gather or present evidence, and no means to contest the findings.<sup>93</sup> Based upon the results of that inquiry, the general court-martial convening authority may involuntarily commit the accused to the custody of the Attorney General, once again without giving the accused any means by which to contest either the facts supporting the decision, or the decision itself.<sup>94</sup> To the extent these provisions have that effect, they are legally invalid for two reasons: (1) the statutory authority for RCM 909, found in Article 76b(a), UCMJ,<sup>95</sup> only applies to charges that have been referred to court-martial; and (2) the involuntary commitment of an individual without a hearing violates the Due Process Clause of the Fifth Amendment.<sup>96</sup>

Before developing the two arguments listed above, it is worth discussing the context in which an accused may wish to raise those arguments. In the case where the defense

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<sup>92</sup> Because charges must be preferred prior to an RCM 706 inquiry, the accused will have access to legal advice from a military defense counsel; however, no statutory or regulatory provision allows actual representation of the accused at a sanity board. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (6 Sept. 2002).

<sup>93</sup> *See* MCM, *supra* note 3, R.C.M. 706. *See also* U.S. DEP'T OF ARMY, REG. 40-400, PATIENT ADMINISTRATION para. 7-6 (12 Mar. 2001) (providing no procedural guidance for the conduct of a sanity board).

<sup>94</sup> *See supra* Part II.B.

<sup>95</sup> Article 76b(a)(1), UCMJ, states:

In the case of a person determined under this chapter [10 USCS §§ 801 et seq.] to be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case, the general court-martial convening authority for that person shall commit the person to the custody of the Attorney General.

UCMJ art. 76b(a)(1).

<sup>96</sup> U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .").

counsel is the person requesting a sanity board, one might reasonably ask why the accused might complain about a finding of mental incapacity. After all, involuntary hospitalization arguably serves the interests of justice and the accused by ensuring that the accused receives care and treatment prior to trial.<sup>97</sup> This line of reasoning presumes at least four facts that may or may not be true: (1) the results of the sanity board are accurate; (2) the accused committed the offenses alleged; (3) the government can prove that the accused committed the offenses alleged; and (4) the accused regards the potential punishment at trial as being worse than confinement in a mental hospital and the stigma associated with involuntary commitment. Thus there are at least two categories of defendants who would want to contest a finding of mental incompetence: those who wish to contest their guilt, either because they are truly innocent or because the government cannot prove its case; and those who stand to suffer more harm from involuntary commitment than criminal punishment. For individuals in these two categories, the right to a hearing in front of a neutral decision maker is of tremendous value because it would give them the procedural opportunity to fight a potentially unjust deprivation of their liberty.

The first argument that RCM 909 should apply only to referred charges requires nothing more than an application of the plain meaning of Article 76b, the statute from which RCM 909 derives its authority.<sup>98</sup> The implementing language of Article 76b, UCMJ, states “Section 876b of title 10, United States Code (article 76b of the Uniform Code of Military

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<sup>97</sup> This proposition is certainly not without exception. See Uphoff, *supra* note 51.

<sup>98</sup> See MCM, *supra* note 3, analysis at A21-58 (“The rule was changed to provide for the hospitalization of an incompetent accused after the enactment of Article 76b, UCMJ, in section 133 of the Nation [sic] Defense Authorization act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 464-66 (1996).”).

Justice) . . . shall apply with respect to charges *referred* to courts-martial . . . .”<sup>99</sup> The plain meaning of this statutory language is that Article 76b, UCMJ, does not apply to charges prior to referral. Although the President has independent authority to prescribe appropriate rules for courts-martial under Article 36, UCMJ,<sup>100</sup> that authority does not include the ability to authorize the Attorney General to involuntarily hospitalize a servicemember.<sup>101</sup> Neither Article 76b, UCMJ, nor RCM 909(c), gives the Attorney General authority to involuntarily hospitalize a servicemember facing charges that have not been referred.<sup>102</sup>

In addition to the lack of statutory support, RCM 909’s provisions authorizing the general court-martial convening authority to involuntarily hospitalize the accused without a hearing violate the Due Process Clause of the Fifth Amendment.<sup>103</sup> As will be demonstrated below, the Due Process Clause guarantees that an individual will not be detained<sup>104</sup> against his or her will without receiving some minimal procedural protections, the most important of which is an adversarial hearing in front of a neutral decision maker to contest the factual

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<sup>99</sup> Act of Feb. 10, 1996, PUB. L. NO. 104-106, Div A, Title XI, Subtitle C, § 1133(c), 110 Stat. 466 (emphasis added).

<sup>100</sup> UCMJ art. 36(a) (2002) (giving the President authority to prescribe rules for trial procedure and rules of evidence).

<sup>101</sup> Authority for the Attorney General to hospitalize a mentally incompetent defendant is found in 18 U.S.C. § 4241 (2000). This statutory authority is referenced explicitly by Article 76b(a)(1)(2), UCMJ, which states, “The Attorney General shall take action in accordance with section 4241(d) of title 18.” Because Article 76b only applies to referred charges, it would be illogical to conclude that the statute supports a rule for courts-martial that requires action by the Attorney General in cases that have not been referred.

<sup>102</sup> UCMJ art. 76b(a); MCM, *supra* note 3, R.C.M. 909(c).

<sup>103</sup> U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law. . .”).

<sup>104</sup> The word “detain” is used as a generic term to describe any circumstance in which a person has been deprived of liberty. Forms of detention include “Terry” stops and arrests made by law enforcement and civil commitment or hospitalization authorized by a competent authority.

basis for the detention.<sup>105</sup> Rule for Courts-Martial 909 fails to provide this fundamental protection, thus violating the servicemember's "right to be free from involuntary confinement by his own government without due process of law."<sup>106</sup>

The Due Process Clause states, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."<sup>107</sup> While the Constitution does not prescribe what process is due, the Supreme Court has interpreted the Fifth Amendment to guarantee that certain minimum standards must be followed before a citizen may be denied liberty.<sup>108</sup> In the

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<sup>105</sup> See *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004).

<sup>106</sup> *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2647 (2004).

<sup>107</sup> U.S. CONST. amend. V.

<sup>108</sup> See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding a Kansas statute allowing for indefinite civil commitment after a judicial finding of dangerousness coupled with mental illness); *Medina v. California*, 505 U.S. 437 (1992) (upholding a California statute requiring a defendant to prove mental incapacity by a preponderance of the evidence); *Foucha v. Louisiana*, 504 U.S. 71 (1992) (finding that a Louisiana statute allowing for the continued involuntary hospitalization of an insanity acquittee who was no longer mentally ill violated the Due Process Clause); *United States v. Salerno*, 481 U.S. 739 (1987) (holding that the 1984 Bail Reform Act allowing for a defendant to be detained based upon dangerousness to the community did not violate the Due Process Clause in part because of the many procedural protections afforded); *Jones v. United States*, 463 U.S. 354 (1983) (ruling that the Due Process Clause permits the government to confine an insanity acquittee to a mental hospital "until such time as he has regained his sanity or is no longer a danger to himself or society"); *Vitek v. Jones*, 445 U.S. 480 (1980) (holding that the Due Process Clause guarantees a prisoner a right to notice, an adversarial hearing, and counsel before he may be transferred to a mental hospital); *Addington v. Texas*, 441 U.S. 418 (1979) (stating that the Due Process Clause requires the state, acting in a civil commitment proceeding, to prove by clear and convincing evidence that the person to be committed is both mentally ill and dangerous to either himself or others); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (establishing procedural Due Process guarantees prior to revocation of parole); *Jackson v. Indiana*, 406 U.S. 715 (1972) (holding that a defendant committed indefinitely solely because of his mental incapacity is entitled by the Due Process Clause to formal commitment proceedings); *Greenwood v. United States*, 350 U.S. 366 (1956) (upholding the federal procedures (18 U.S.C. §§ 4244 - 4248) for commitment of mentally ill defendants, which included an adversarial hearing in addition to other safeguards). In the cases cited above, the Supreme Court makes no distinction between the procedures guaranteed by the Fifth Amendment as applied directly to the federal government, or as applied via the Fourteenth Amendment to the states. Although not stated expressly by any of the authorities cited above, the application of precedent within the many opinions makes it clear that the law applied to the states through the Fourteenth Amendment is equally applicable to the federal government under the Fifth Amendment. See *Hamdi*, 124 S. Ct. at 2646-48 (citing numerous cases decided under the Fourteenth Amendment as support for the court's interpretation of the Fifth Amendment's Due Process Clause).

words of Chief Justice Rehnquist, “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>109</sup>

The first step in determining whether the involuntary commitment provisions of RCM 909 comport with due process is to identify the applicable legal standard. When deciding whether government action affecting life, liberty or property satisfies due process, the Supreme Court has traditionally applied a test from the 1976 case of *Mathews v. Eldridge*.<sup>110</sup> In *Mathews*, the Court considered the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>111</sup>

Although *Mathews* involved the deprivation of government benefits rather than individual liberty, the Court subsequently cited *Mathews* favorably in numerous cases involving involuntary detention.<sup>112</sup> More recently, in *Medina v. California*,<sup>113</sup> Justice Kennedy, writing for the majority, rejected the *Mathews* test in cases involving the validity of state criminal

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<sup>109</sup> *Salerno*, 481 U.S. at 755.

<sup>110</sup> 424 U.S. 319 (1976).

<sup>111</sup> *Id.* at 335. The *Mathews v. Eldridge* test is applicable to claims that governmental action has failed to comport with guarantees of “procedural” due process, rather than “substantive” due process. See *Salerno*, 481 U.S. at 746. “Substantive” due process “prevents the government from engaging in conduct that ‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered liberty.’” *Id.* (internal citations omitted).

<sup>112</sup> See *Salerno*, 481 U.S. at 747 (denial of bail); *Addington*, 441 U.S. at 425 (civil commitment); *Jones*, 463 U.S. at 366 (commitment following successful sanity defense).

<sup>113</sup> 505 U.S. 437 (1992).

procedures.<sup>114</sup> Justice Kennedy instead applied the test set out in *Patterson v. New York*.<sup>115</sup>

The *Patterson* test would uphold a state criminal procedure under the Due Process Clause unless “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>116</sup> Under the *Patterson* test, procedures that comport with due process are essentially those that have roots in historical practice, as reflected in the English common law tradition.<sup>117</sup> Because the *Patterson* test limits the protections of the Due Process Clause to those practices that have existed historically, rather than allowing for judicial expansion through the more subjective balancing test prescribed by *Mathews*, it necessarily gives greater deference to legislative judgments in the field of criminal procedure.<sup>118</sup>

Unfortunately, the debate over the appropriate test by which to evaluate compliance with procedural due process did not end with *Medina*. Just last year, the Supreme Court revisited the question of what legal standard to apply when determining whether government

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<sup>114</sup> *Id.* at 445.

<sup>115</sup> *Medina*, 505 U.S. at 446 (citing *Patterson v. New York*, 432 U.S. 197 (1977)). Justice O’Connor argued in a concurring opinion, joined by Justice Souter, that the *Mathews* balancing test remains appropriate in cases of criminal procedure, and that the majority’s exclusive reliance upon *Patterson* was not justified. *Id.* at 453 (O’Connor, J. concurring). Likewise, Justice Blackmun, joined by Justice Stevens, argued in a strong dissent that the majority’s application of the *Patterson* test over that of *Mathews* was incorrect. *Id.* at 459 (Blackmun, J. dissenting).

<sup>116</sup> *Medina*, 505 U.S. at 445 (citing *Patterson*, 432 U.S. at 201-02).

<sup>117</sup> *Id.* at 446.

<sup>118</sup> In *Medina*, the Court ultimately ruled that the procedure established by the State of California was neither fundamentally unfair, nor did it violate a universal practice under the common law. The Due Process Clause, therefore, was not violated by a statute requiring the defendant to prove lack of mental capacity by a preponderance of the evidence. *Id.* at 449.

detention of an individual violates the Due Process Clause.<sup>119</sup> In *Hamdi v. Rumsfeld*, the Court answered the limited question of whether the government could detain a citizen captured abroad and held as an enemy combatant on U.S. soil, without access to either judicial review or meaningful due process.<sup>120</sup> Justice O'Connor, writing for a plurality, applied the *Mathews* balancing test.<sup>121</sup> Balancing Hamdi's interest in freedom against the government's need to detain enemy combatants, Justice O'Connor concluded that even under circumstances of war or national emergency "commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection."<sup>122</sup> The purpose of those procedures must be to "protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."<sup>123</sup> The plurality opinion concluded that even under the circumstances of the Global War on Terror, the Due Process Clause guaranteed Hamdi the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker."<sup>124</sup> Justice Scalia, joined by Justice Thomas, wrote a dissent in which he

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<sup>119</sup> See *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004).

<sup>120</sup> *Id.* at 2635.

<sup>121</sup> *Id.* at 2646. Justices Souter and Ginsberg both dissented, arguing that the government's detention of Hamdi was illegal, and therefore did not reach the question of what process is guaranteed by the Due Process Clause. *Id.* at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). They did, however, support the plurality's conclusion that Hamdi was entitled, at a minimum, to notice and a hearing before a neutral decision maker. *Id.*

<sup>122</sup> *Id.* at 2646-47 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). The majority's citation to *Jones* is important because that case involved commitment following a finding of not guilty by reason of insanity. The Court's reliance upon a case involving state criminal procedure while applying the *Mathews* balancing test supports a conclusion that the *Medina* decision may not have a significant impact on the Court's due process analysis in future cases.

<sup>123</sup> *Id.* at 2647 (quoting *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

<sup>124</sup> *Id.* at 2648. One of the issues initially litigated by Hamdi included his right to the assistance of counsel; however, by the time the Supreme Court received the case, the government provided Hamdi with an attorney,

sharply criticized the plurality's reliance on the *Mathews* test.<sup>125</sup> Although not relying directly on *Patterson*, Justice Scalia once again sought authority primarily from the common law tradition as it treated detained enemy combatants.<sup>126</sup> Justice Scalia's historical analysis led him to the conclusion that Hamdi was entitled to be released, unless either the executive began criminal prosecution or congress acted to suspend the writ of habeas corpus.<sup>127</sup> Although the vitality of the *Mathews* balancing test seems to be supported by the *Hamdi* decision, it remains unclear what the Court might do in a case involving a matter of criminal procedure, such as temporary commitment of an incompetent defendant.

Whether applying the *Mathews* balancing test or the *Patterson* inquiry into the common law tradition, the best evidence of the meaning of the Due Process Clause, as applied to the commitment of a mentally incompetent defendant, is found in current Supreme Court precedent. Beginning with *Vitek v. Jones*,<sup>128</sup> the Court addressed the question of

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making the issue moot. The Court stated in dicta that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand." *Id.* at 2659.

<sup>125</sup> *Id.* at 2672 (Scalia, J., dissenting). The language chosen by Justice Scalia is telling of the degree to which he disagrees with the majority's application of the *Mathews* balancing test:

[T]he plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protection *it* thinks appropriate. It 'weigh[s] the private interest . . . against the Government's asserted interest,' and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a 'neutral' military officer rather than judge and jury. It claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, a case involving . . . *the withdrawal of disability benefits!*

*Id.*

<sup>126</sup> *Id.* at 2663 (Scalia, J., dissenting).

<sup>127</sup> *Id.* at 2671 (Scalia, J. dissenting).

<sup>128</sup> 445 U.S. 480 (1980).

whether the Due Process Clause guaranteed a prisoner any procedural rights before he could be transferred involuntarily to a mental hospital for treatment.<sup>129</sup> In *Vitek*, the Director of the Department of Correctional Services transferred Jones, the appellee, from prison to a state mental hospital following a required evaluation by a mental health professional.<sup>130</sup> The state statute authorizing Jones's transfer did not provide any means for him to contest either the results of his mental health evaluation or the validity of his transfer.<sup>131</sup> In its analysis, the Court recognized that "commitment to a mental hospital produces 'a massive curtailment of liberty,' and in consequence 'requires due process protection.'"<sup>132</sup> Because the law did not allow Jones to challenge the factual basis for his transfer, the Court affirmed the district court's finding of a due process violation.<sup>133</sup> The *Vitek* decision also affirmed the district court's articulation of the following procedures that should have been afforded to the Jones: (1) written notice of the contemplated action; (2) a hearing at which the individual would have access to the government's evidence and an opportunity to present a defense; (3) an opportunity to call witnesses and to cross-examine witnesses called by the government; (4) an independent decision maker; (5) a written statement of the final decision along with the evidence considered by the factfinder; (6) availability of legal assistance; and (7) timely notice of each of the above rights.<sup>134</sup> These procedures were again cited by the Supreme

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<sup>129</sup> *Id.* at 482-83.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 484.

<sup>132</sup> *Id.* at 491-92 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) and *Addington v. Texas*, 441 U.S. 418, 425 (1979)) (internal citations omitted).

<sup>133</sup> *Id.* at 496.

<sup>134</sup> *Id.* at 495-96 (citing *Morrissey v. Brewer*, 408 U.S. 471, 496-98 (1972)).

Court a few years later in *United States v. Salerno*,<sup>135</sup> a case involving pretrial detention of a criminal defendant.

In *Salerno*, the Court upheld the Bail Reform Act of 1984 after finding that the statute provided procedural protections similar to those articulated in *Vitek*.<sup>136</sup> The issue in *Salerno* was whether the provision of the Bail Reform Act allowing for continued detention of an arrestee to assure the safety of the community violated the Due Process Clause of the Fifth Amendment.<sup>137</sup> In its analysis, the Court weighed the government's interest "in preventing crime by arrestees" against "the individual's strong interest in liberty."<sup>138</sup> In reaching its decision in favor of the government, the Court relied heavily upon the "extensive safeguards" contained in the statute, including: (1) the right to counsel; (2) the right to a detention hearing in front of a judicial officer; (3) the right to testify, present evidence, and cross-examine witnesses; (4) the requirement that the judicial officer consider prescribed factors in arriving at a decision; (5) the requirement that the government prove its case by clear and convincing evidence; (6) the requirement that the judicial officer make written findings of fact supporting the decision to detain; and (6) the right to seek judicial review.<sup>139</sup> These

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<sup>135</sup> 481 U.S. 739 (1987).

<sup>136</sup> *Id.* at 755.

<sup>137</sup> *Id.* at 741.

<sup>138</sup> *Id.* at 750.

<sup>139</sup> *Id.* at 751-52.

procedural protections, in the words of the Court, “must attend this adversarial hearing” to defeat a constitutional challenge.<sup>140</sup>

Although the Supreme Court has decided numerous other cases requiring application of the Due Process Clause to involuntary detention,<sup>141</sup> the question of whether RCM 909 violates the Due Process Clause of the Fifth Amendment can be answered fully by the Court’s decisions in *Vitek*, *Salerno*, and *Hamdi*. First, the *Jones* decision makes it clear that involuntary commitment to a mental institution infringes upon a constitutionally-protected liberty interest.<sup>142</sup> Second, *Jones* and *Hamdi* strongly support a conclusion that commitment for any purpose, including mental incapacity, requires some due process protection.<sup>143</sup> Third, *Hamdi* makes clear that the Due Process Clause guarantees notice of the basis for the detention and an opportunity to challenge that basis in front of a neutral decision maker, even when the government’s interest is at its peak.<sup>144</sup> And finally, from both *Jones* and *Salerno*, a procedural framework including the following will comply with the Due Process Clause: (1) notice of the basis for the detention; (2) a right to counsel; (3) an adversarial hearing in front of a neutral decision maker; (4) the right to testify, call witnesses, present evidence, and cross-examine government witnesses; (5) written findings by the decision maker; and (6) the

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<sup>140</sup> *Id.* at 754.

<sup>141</sup> See cases cited *supra* note 108.

<sup>142</sup> *Vitek v. Jones*, 445 U.S. 480, 491-492.

<sup>143</sup> *Hamdi*, 124 S.Ct. at 2646-47.

<sup>144</sup> *Id.* at 2648.

right to a judicial review of the outcome.<sup>145</sup> Of the six baseline procedures listed above, RCM 909 provides only for notice of the basis for commitment, access to counsel, and written findings of the decision maker.<sup>146</sup> The fundamental right to contest the factual basis for commitment in front of a neutral decision maker, as described in *Vitek*, is completely absent.

RCM 909's deficiencies become even more apparent when compared to the commitment procedures applied in federal court. Before a federal criminal defendant may be involuntarily committed due to mental incompetence, he is entitled to a psychiatric or psychological evaluation followed by a judicial hearing.<sup>147</sup> At the hearing, the defendant is entitled to representation by counsel, the opportunity to testify, present evidence, subpoena

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<sup>145</sup> See *supra* notes 134, 139 and accompanying text.

<sup>146</sup> Although the accused has no right to a direct appeal of the interlocutory determination of incompetence by the sanity board or convening authority, one could argue that the availability of habeas corpus suffices for access to judicial review.

<sup>147</sup> 18 U.S.C. § 4241 (2000).

§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant. At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing. The hearing shall be conducted pursuant to the provisions of section 4247(d).

*Id.*

witnesses, and cross-examine witnesses for the government.<sup>148</sup> Only after the court determines by a preponderance of the evidence that the defendant is mentally incompetent may he be committed.<sup>149</sup> In comparison to the federal criminal procedures described above, RCM 909 is woefully inadequate.

Considering the significant procedural shortcomings of RCM 909, both in relation to federal criminal procedures and the Due Process Clause, in conjunction with the lack of statutory support for involuntary hospitalization prior to referral, the only reasonable conclusion is that the provisions of RCM 909(c) are invalid.

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<sup>148</sup> *Id.* § 4247(d).

(d) Hearing. At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

<sup>149</sup> *Id.* § 4241(d).

(d) Determination and disposition. If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

D. Recommendations for Amending RCM 909

At a minimum, those provisions of RCM 909 that apply to charges not yet referred must be repealed, not only because they violate the Due Process Clause, but simply because they are not supported by the implementing language of Article 76b, UCMJ.<sup>150</sup> Appendix A is a draft amendment to RCM 909 containing numerous changes based on the arguments above. The proposed changes bring the rule into compliance with the Due Process Clause, respect the limited applicability of Article 76b, UCMJ, restore final discretion in the convening authority, and provide procedures consistent with federal criminal law.

Referring to Appendix A, the changes in section (c) reflect that the findings of a sanity board are not the same as a judicial determination of mental incapacity. The purpose of an RCM 706 inquiry is “to provide for the detection of mental disorders not . . . readily apparent to the eye of the layman.”<sup>151</sup> The board’s findings are not legal conclusions, and should not be construed as such for purposes of justifying involuntary hospitalization.<sup>152</sup> The amendment to section (c) reflects a conclusion that the results of the sanity board should be treated the same as any other piece of factual evidence that might be relevant to the discretionary decision of a convening authority.

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<sup>150</sup> See *supra* Part IIC.

<sup>151</sup> See *United States v. Nix*, 36 C.M.R. 76, 90 (C.M.A. 1965) (quoting *Wear v. United States*, 218 F.2d 24, 26 (1954)).

<sup>152</sup> See *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (holding that a sanity board report is not admissible on the issue of the accused’s mental capacity, in part because the court would be denied the significant benefit of cross-examination of the expert witnesses).

The only contrary argument for maintaining the current provisions is that Article 76b(a)(1) requires the convening authority to commit the accused to the custody of the Attorney General after a finding of mental incapacity.<sup>153</sup> This argument fails, however, because it confuses the relevant evidence contained in the sanity board report with the factual findings required by Article 76(b)(a)(1)—the “finding of mental incapacity” referred to in Article 76b(a)(1) is a finding based on a consideration of all relevant evidence, not just the written conclusions of a sanity board. RCM 909(c), as written, authorizes the convening authority to commit the accused based only upon the factual findings of a sanity board, rather than requiring that those facts be tested by the adversarial process and then applied to the law by a court.

Looking again at Appendix A, the addition of section (e) implements 18 U.S.C. § 4247(d), providing basic procedural rights applicable to hearings. These are the same rights granted to an accused found not guilty only by reason of lack of mental responsibility,<sup>154</sup> and, as previously argued, are guaranteed by the Due Process Clause. Section (f) also contains a significant change in that it gives the convening authority discretion to withdraw or dismiss charges following a military judge’s finding that the accused is mentally incompetent. While

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<sup>153</sup> UCMJ art. 76b(a)(1) (2002).

In the case of a person determined under this chapter to be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case, the general court-martial convening authority for that person shall commit the person to the custody of the Attorney General.

*Id.*

<sup>154</sup> See MCM, *supra* note 3, R.C.M. 1102A(c).

this may seem to contradict the mandatory language of Article 76b(a)(1), UCMJ, it actually reflects two fundamental concepts of the military justice system. The first is that the convening authority is vested with a quasi-judicial role that allows him to accept or reject the findings and sentence of a court-martial, as long as the action is not more harmful to the accused than that of the court.<sup>155</sup> The second is that the convening authority has a prosecutorial function, in that he is the one who ultimately decides what offenses warrant prosecution.<sup>156</sup> Justification for this change finds further support in 18 U.S.C. § 4241(d), the statute upon which Article 76b(a) is based.<sup>157</sup> While § 4241(d) clearly divests authority from the court as to whether an incompetent defendant shall be committed, it does nothing to divest the U.S. Attorney of authority.<sup>158</sup> In fact, an incompetent defendant who has been hospitalized by the Attorney General may not remain hospitalized after “pending charges against him are disposed of according to law.”<sup>159</sup> The use of the broad phrase “disposed of according to law” is reasonably interpreted to include action by the U.S. Attorney dismissing the charges.<sup>160</sup> Because the convening authority has a prosecutorial role that allows him to

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<sup>155</sup> *Id.* R.C.M. 1107(b)(1) (“The action to be taken on the findings and sentence is within the sole discretion of the convening authority.”).

<sup>156</sup> *Id.* R.C.M. 403.

<sup>157</sup> *Id.* R.C.M. 909 analysis, at A21-58.

<sup>158</sup> *See* 18 U.S.C. § 4241(d)(2)(B) (2000) (“The Attorney General shall hospitalize the defendant for treatment in a suitable facility-- (2) for an additional reasonable period of time until--(B) the pending charges against him are disposed of according to law; whichever is earlier.”).

<sup>159</sup> *Id.*

<sup>160</sup> S. REP. NO. 98-255, at 222 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3419 n.52 (discussing disposition of a defendant who has been hospitalized under the provisions of 18 U.S.C. § 4241(d) because he lacks mental capacity to stand trial).

If all charges against a presently mentally defective defendant are dropped, the head of the facility in which the defendant is hospitalized may notify State authorities of the defendant’s

dispose of charges by means other than trial, it only makes sense that Congress would not seek to foreclose action in the military justice system that is permitted in the federal system.<sup>161</sup> Finally, section (g) adds provisions for a judicial determination of dangerousness when an incompetent servicemember does not regain competency after four months. These provisions implement Article 76b(a)(3), and are similar to those found in R.C.M. 1102A.<sup>162</sup>

### III. Mental Responsibility

#### A. Substantive Provisions Relating to Mental Responsibility

In addition to the Constitutional requirement that the accused be mentally competent to stand trial, the common law affirmative defense of insanity, referred to in the military justice system as the lack of mental responsibility, is codified in Article 50a(a), UCMJ,<sup>163</sup>

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condition so that State authorities may determine if civil commitment proceedings are warranted. If State authorities cannot or will not arrange for the commitment of the defendant, Federal proceedings under section 2425 may be instituted if the reason for dropping the charges is related solely to the mental condition of the defendant. If the charges were dropped for other reasons, such as inadequate evidence to prove an offense, the Federal Government has no further interest in the case and cannot seek to civilly commit the defendant even if the State chooses not to proceed.

*Id.*

<sup>161</sup> Article 76b(b), UCMJ, applicable when an accused has been found not guilty only by reason of lack of mental responsibility, contains similar mandatory language for commitment of the accused to the Attorney General. See UCMJ art. 76b(b)(4) (2002). Interestingly, the discussion following R.C.M. 1107(b)(4), states, "Commitment of the accused to the custody of the Attorney General is discretionary." MCM, *supra* note 3, R.C.M. 1107(b)(4) discussion. It is not clear why the drafters of the *Manual for Courts-Martial* would view the mandatory provisions of Article 76b(a) differently from those of Article 76b(b).

<sup>162</sup> See MCM, *supra* note 3, R.C.M. 1102A.

<sup>163</sup> UCMJ art. 50a(a). The text of Article 50a(a) is reproduced *supra* note 4.

and implemented by RCM 916k(1).<sup>164</sup> Rule for Courts-Martial 916(k)(1) states, “It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts.”<sup>165</sup> Unfortunately, the key terms contained within RCM 916(k)(1) are not defined in the rule. Understanding the elements of the insanity defense therefore requires practitioners to have a basic understanding of its history.

The insanity defense has existed throughout the history of American jurisprudence, and derives its elements from the English common law.<sup>166</sup> The most widely cited source for the insanity defense is a discussion that occurred in 1843 in the English House of Lords regarding the *M’Naghten Case*.<sup>167</sup> From that discussion evolved the *M’Naghten* Rule, which states, in part:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.<sup>168</sup>

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<sup>164</sup> MCM, *supra* note 3, R.C.M. 916(k)(1).

<sup>165</sup> *Id.*

<sup>166</sup> See generally HENRY WEIHEFON, MENTAL DISORDER AS A CRIMINAL DEFENSE 52-81 (1954); CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 101, at 7-17 (15th ed. 1993) [hereinafter WHARTON’S CRIMINAL LAW].

<sup>167</sup> See, e.g., WEIHOFEN, *supra* note 166, at 61.

<sup>168</sup> *Id.*

Over the course of much of the nineteenth and twentieth centuries, the insanity defense underwent a gradual expansion, largely at the hands of the state judiciaries.<sup>169</sup> One major expansion occurred in 1870, when the highest court of New Hampshire rejected the *M'Naghten* Rule,<sup>170</sup> adopting instead what later became known as the *Durham* Rule.<sup>171</sup> The *Durham* Rule held that a defendant must be acquitted if his crime “was the product of mental disease or mental defect.”<sup>172</sup> Another major expansion occurred with the development of the “irresistible impulse” test.<sup>173</sup> Ultimately incorporated into the American Law Institute’s Model Penal Code, the “irresistible impulse” test excuses a defendant’s otherwise criminal conduct if, due to a mental disease or defect, he lacks substantial capacity to “conform his conduct to the requirements of the law.”<sup>174</sup> Following a failed attempt by John Hinckley, Jr. to assassinate President Ronald Reagan on 30 March 1981, and the subsequent trial focusing on Hinckley’s insanity, Congress passed the Insanity Defense Reform Act of 1984.<sup>175</sup> That

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<sup>169</sup> See WHARTON’S CRIMINAL LAW, *supra* note 166, §§ 101-05, at 7-38; S. REP. NO. 98-255, at 223 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3405.

<sup>170</sup> See *State v. Pike*, 49 N.H. 399 (1870).

<sup>171</sup> See *Durham v. United States*, 214 F.2d 862 (1954); WAYNE R. LAFAVE, CRIMINAL LAW § 7.4, at 393 (4th ed. 2003).

<sup>172</sup> 214 F.2d at 875.

<sup>173</sup> LAFAVE, *supra* note 171, § 7.3, at 389. The irresistible impulse test and the *Durham* Rule developed independently of one another.

<sup>174</sup> *Id.* § 7.5 at 398. See AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, pt. I, § 4.01 (1985) [hereinafter MODEL PENAL CODE].

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

*Id.*

<sup>175</sup> Insanity Defense Reform Act, Ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984).

portion of the act redefining the insanity defense, now codified in 18 U.S.C. § 17,<sup>176</sup> resulted in a substantial narrowing of the insanity defense as it had come to exist in the federal criminal system, largely resurrecting the *M’Naghten* Rule from 1843.<sup>177</sup> Two years later, Congress passed the Military Justice Amendments of 1986, changing the UCMJ insanity defense to mirror that of the federal criminal justice system.<sup>178</sup> Because the language of Article 50a(a) (and ultimately RCM 916(k)(1)) comes directly from 18 U.S.C. § 17, both the legislative history and judicial interpretation of the federal criminal statute are important to understanding the military defense of lack of mental responsibility.<sup>179</sup>

Rule for Courts-Martial 916(k)(1) creates a test with two elements for establishing the affirmative defense of lack of mental responsibility: the accused must prove by clear and

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<sup>176</sup> 18 U.S.C. § 17 was originally codified at 18 U.S.C. § 20. Act of Nov. 10, 1986, Pub. L. No. 99-646, 100 Stat. 3599.

<sup>177</sup> S. REP. NO. 98-255, at 222 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3404-10 (discussing the reasons for eliminating the volitional prong of the cognitive-volitional test, as reflected in the Model Penal Code insanity defense, and returning to the pure cognitive test, as reflected in the *M’Naghten* Rule).

<sup>178</sup> National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, Military Justice Amendments of 1986, div. A, tit. VIII, § 802, 100 Stat. 3905 (1986). *See generally* MCM, *supra* note 3, R.C.M. 916(k) analysis, at A21-64. Prior to the Military Justice Amendments of 1986, RCM 916(k)(1) essentially restated the insanity defense from the Model Penal Code.

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity to appreciate the criminality of that person’s conduct or to conform that person’s conduct to the requirements of the law. As used in this rule, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(k)(1) (1984) [hereinafter 1984 MCM]. In the original 1969 MCM, the insanity defense was essentially the *M’Naghten* Rule plus the irresistible impulse test. *See United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977) (holding that the President lacks authority under Article 36, UCMJ, to prescribe affirmative defenses, like insanity, and finding that the appropriate test to be applied in courts-martial was that found in § 4.01 of the Model Penal Code rather than paragraph 120b of the 1969 MCM).

<sup>179</sup> *See, e.g., United States v. Martin*, 56 M.J. 97, 103 (2001) (reciting the statutory history of Article 50a(a), UCMJ, as derived from 18 U.S.C. § 17).

convincing evidence: (1) that he suffered from a severe mental disease or defect at the time of the acts constituting the offense; and (2) that, as a result of that severe mental disease or defect, he was unable to appreciate either, the nature and quality of his acts or the wrongfulness of his acts.<sup>180</sup> The difficulty in understanding the elements is twofold. First, when is a mental disease or defect “severe?” And second, what does it mean to be incapable of “appreciating” either the “nature and quality” or “wrongfulness” of one’s acts?

1. *Defining “Severe Mental Disease or Defect”*

Unfortunately, neither Article 50a(a) nor RCM 916(k)(1) define the word “severe.” The President attempted to provide some guidance in RCM 706(c)(2)(A), which states in a parenthetical that “the term ‘severe mental disease or defect’ does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.”<sup>181</sup> The *Military Judges’ Benchbook* uses similar language in the instruction on the defense of lack of mental responsibility:

The term severe mental disease or defect can be no better defined in the law than by use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders.<sup>182</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> MCM *supra* note 3, R.C.M. 706(c)(2)(A).

<sup>182</sup> BENCHBOOK, *supra* note 9, para. 6-4.

This language, although not included in Article 50a(a), UCMJ, or its federal counterpart, 18 U.S.C. § 17, finds some support in the legislative history of the Insanity Defense Reform Act of 1984.<sup>183</sup> Specifically addressing the inclusion of the word “severe,” the Senate Judiciary Committee explained that the “concept of severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as an ‘inadequate personality,’ ‘immature personality,’ or a pattern of ‘antisocial tendencies’ do not constitute the defense.”<sup>184</sup> Nonetheless, the potential effect of the definition found in both RCM 706 and the *Benchbook* is to narrow the affirmative defense of lack of mental responsibility by potentially excluding severe mental disorders that do not meet the definition of psychosis.<sup>185</sup> As will be argued below, this unjustified limitation upon a substantive defense is both contrary to military case law and an unlawful exercise of the President’s rule making authority under Article 36, UCMJ.<sup>186</sup>

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<sup>183</sup> S. REP. NO. 98-255, at 229 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3411.

<sup>184</sup> *Id.* See also LAFAYE, *supra* note 171, § 7.2(b), at 381 (concluding that the word “severe” in 18 U.S.C. § 17 is of no significance because the concerns raised in the legislative history that justified its addition were only relevant to the volitional prong (irresistible impulse test) of the Model Penal Code provision).

<sup>185</sup> Psychosis is defined as “[a] mental disorder causing gross distortion or disorganization of a person’s mental capacity, affective response, and capacity to recognize reality, communicate, and relate to others to the degree of interfering with his capacity to cope with ordinary demands of everyday life.” STEDMAN’S MEDICAL DICTIONARY 1286 (25th ed. 1990).

<sup>186</sup> Article 36(a), UCMJ, states:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ art. 36(a) (2002).

In *United States v. Proctor*<sup>187</sup> and *United States v. Benedict*,<sup>188</sup> the COMA affirmatively rejected any requirement that an accused be suffering from a psychosis to support an insanity defense. Looking first at *Proctor*,<sup>189</sup> the court stated expressly “that an accused need not be found to be suffering from a psychosis in order to assert an affirmative defense based on lack of mental responsibility, even though RCM 916(k) requires a finding of ‘a severe mental disease or defect.’”<sup>190</sup> Because the court is empowered under Article 67, UCMJ, to interpret the law, which includes the meaning of the insanity defense as it is found in Article 50a, UCMJ, the court’s interpretation necessarily supersedes that found in RCM 706 and the *Benchbook*.<sup>191</sup> Although one might argue that the exclusion of “nonpsychotic behavior disorders” from the definition of “severe mental disease or defect” is not the same as requiring that the accused suffer from a psychosis, any possible distinction is semantic at best. As stated in *Benedict*, “Military law has never recognized an absolute rule that an accused must suffer from a psychosis in order to merit acquittal by reason of insanity.”<sup>192</sup> To the extent the phrase “nonpsychotic behavior disorder” might cause either a court-martial panel or a sanity board to believe that the insanity defense requires proof of a psychosis, the phrase is contrary to law.

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<sup>187</sup> 37 M.J. 330 (1993).

<sup>188</sup> 27 M.J. 253 (1988).

<sup>189</sup> See *supra* note 19 and accompanying text.

<sup>190</sup> 37 M.J. at 336.

<sup>191</sup> See UCMJ art. 67(c) (“The Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.”); UCMJ art. 66(c) (“The Court of Criminal Appeals . . . may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”).

<sup>192</sup> 27 M.J. at 259.

Even if one were to argue that *Proctor* and *Benedict* do not have precedential value in defining what constitutes a “severe mental disease or defect,”<sup>193</sup> there is still a strong argument that the President exceeded his authority under Article 36, UCMJ, by imposing a limiting definition.<sup>194</sup> Article 36(a), UCMJ, by its express language, limits the President’s rule making authority to “[p]retrial, trial and post-trial procedures, including modes of proof.”<sup>195</sup> . . .” Military appellate courts have consistently held that the President’s power under Article 36(a) does not extend to the substantive criminal law, including both crimes and affirmative defenses.<sup>196</sup> While this proposition appears in numerous sources, it is, perhaps, most clearly stated in *Ellis v. Jacob*.<sup>197</sup> In *Ellis*, the COMA held that RCM 916(k)(2) was invalid because it purported to bar the accused from presenting psychological

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<sup>193</sup> There are essentially two arguments in support of this conclusion. The first is that the language in both *Proctor* and *Benedict* was dicta, and therefore not binding in future cases. Looking first at *Proctor*, the issue specifically addressed by the court was whether the military judge’s finding that the accused possessed mental capacity to stand trial was in error. 37 M.J. at 330. The *Proctor* court made reference to the decision in *Benedict* primarily for the purpose of analogy, rather than engaging in the more thorough review which would ordinarily accompany interpretation of a federal statute. In *Benedict*, the court addressed four issues regarding the admissibility of evidence in a case that included a defense of lack of mental responsibility. 27 M.J. at 253. Although the court specifically addressed the admissibility of evidence to prove “mental disease or defect,” the case was tried prior to Congress’s 1986 amendment of Article 50a, UCMJ. See *supra* note 178 and accompanying text. The statement made in *Benedict* regarding the court’s past treatment of psychosis was, therefore, relevant to the insanity defense before Congress added the word “severe.”

<sup>194</sup> UCMJ art. 36. See *supra* note 186 (reproducing the relevant text of Article 36(a), UCMJ).

<sup>195</sup> *Id.*

<sup>196</sup> See, e.g., *United States v. Czeschin*, 56 M.J. 236 (2002) (stating that Article 36(a) does not extend to substantive offenses); *United States v. Valigura*, 54 M.J. 187 (2000) (reciting the text of Article 36(a) and stating that the President’s authority does not extend to substantive crimes); *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977) (holding that the defense of mental responsibility is a rule of substantive law, and rejecting paragraph 120b of the original 1969 *Manual for Courts-Martial*); *United States v. Smith*, 33 C.M.R. 3 (C.M.A. 1963) (invalidating a *Manual for Courts-Martial* provision that incorrectly defined the defense of self-defense because it fell outside the President’s Article 36 power). But see *United States v. Smith*, 17 C.M.R. 314 (C.M.A. 1954) (upholding the original 1969 *Manual for Courts-Martial* provision for mental responsibility because of an inference that Congress’s deferral to the President to prescribe circumstances warranting commitment included the authority to define related defenses).

<sup>197</sup> 26 M.J. 90 (C.M.A. 1988).

evidence relevant to his mental state at the time of the alleged offense.<sup>198</sup> In so holding, the court articulated the following proposition of law: “the President’s rule-making authority does not extend to matters of substantive military criminal law [citing Articles 36 and 56, UCMJ]. Thus, even ignoring constitutional questions, such a Manual provision [RCM 916(k)(2)] could only be effective if it reflected a legislative act.”<sup>199</sup> Although the *Ellis* decision did not cite any authority in support of this proposition, it is consistent with the earlier decision of *United States v. Frederick*,<sup>200</sup> in which the COMA held:

[T]he standard for determining complete mental responsibility, as with partial mental responsibility, is a matter of substantive law whether the standard is termed an affirmative defense or some other type of defense. Therefore, the adoption of the standard for mental responsibility is not within the scope of the President’s rulemaking powers under Article 36 UCMJ.<sup>201</sup>

Although the *Frederick* decision is over twenty-five years old, its continued validity is reflected by the consistent analysis in *Ellis*.

The holding of *Frederick* is directly on point with the question of whether the President may limit the definition of “severe mental disease or defect.” Applying *Ellis* and *Frederick*, the weight of the law supports a conclusion that Article 36 does not give the President authority to limit the definition of severe mental disease or defect to “nonpsychotic behavior disorders” absent legislative action. It should be noted that there is at least a plausible argument that use of the phrase “nonpsychotic behavior disorder” within the

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<sup>198</sup> *Id.* at 92-93.

<sup>199</sup> *Id.*

<sup>200</sup> 3 M.J. 230 (C.M.A. 1977).

<sup>201</sup> *Id.* at 236.

legislative history of the Insanity Defense Reform Act of 1984 is sufficient legislative action to support the President's definition of "severe."<sup>202</sup> This argument finds support in a handful of federal decisions at both the trial and appellate levels that have interpreted "severe mental disease or defect" by reference to the legislative history.<sup>203</sup> However, because neither the holding nor the analyses of these federal cases is binding upon the military appellate courts,<sup>204</sup> the COMA's decisions in *Proctor* and *Benedict* still provide a more authoritative interpretation of Article 50a(a), UCMJ. Thus, the definition of "severe mental disease or defect" found in RCM 706 and the *Benchbook* is invalid because it is unsupported by both statute and military case law.

The definition's continued use in either a court-martial or by a sanity board makes it inherently more difficult for the accused to gather evidence of and to prove the defense of lack of mental responsibility. In consequence, both provisions should be amended by

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<sup>202</sup> See *supra* notes 183-184 and accompanying text.

<sup>203</sup> See *United States v. Cartagena-Carrasquillo*, 70 F.3d 706 (1st Cir. 1995) (holding that the trial judge did not err by excluding evidence of "significant" post traumatic stress disorder); *United States v. Denny-Shaffer*, 2 F.3d 999 (10th Cir. 1993) (holding that the trial court erred by not admitting evidence of multiple personality disorder, a disorder not expressly excluded in the legislative history of 18 U.S.C. § 17); *United States v. Salava*, 978 F.2d 320 (7th Cir. 1992) (rejecting a government argument that expert testimony on the insanity defense should be excluded because the diagnosis did not qualify as "severe" for purposes of 18 U.S.C. § 17; instead accepting the expert's opinion that the defendant's diagnosis of antisocial and paranoid personality disorder were severe); *United States v. Rezaq*, 918 F. Supp. 463 (D.D.C. 1996) (holding that post-traumatic stress disorder could qualify as a "severe mental disease or defect" under 18 U.S.C. § 17).

<sup>204</sup> See *Garrett v. Lowe*, 39 M.J. 293, 296 n.4 (C.M.A. 1994). For a thorough treatment of this very complicated issue, see H. F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25.

deleting the words “or by non-psychotic behavior disorders and personality disorders.”<sup>205</sup>

From a procedural standpoint, defense counsel should raise this issue with the military judge at the earliest opportunity, either by contesting the validity of the sanity board or by making an early request for an amendment to *Benchbook* instruction 6-4. Although military judges are, for good reason, reluctant to modify standard instructions, requesting an amended instruction is the best method of preserving the issue for appeal.<sup>206</sup> In addition, defense counsel should ensure that expert witnesses, whether for the government or the defense, provide a medical opinion regarding the severity of the accused’s mental disease or defect, rather than attempting to apply the arguably invalid legal definition contained in RCM 706.

## 2. Defining “Appreciate,” “Nature and Quality,” and “Wrongfulness”

Turning from the first element of the insanity defense to the second, namely, that the accused was “unable to appreciate the nature and quality or the wrongfulness of his or her acts,”<sup>207</sup> the terms “appreciate,” “nature and quality,” and “wrongfulness” are not defined by either statute or the *Manual for Courts-Martial*. In fact, in most jurisdictions that follow the *M’Naghten* Rule, or some variation, the terms are similarly undefined.<sup>208</sup> The legislative history of the Insanity Defense Reform Act of 1984 is also silent on the meaning of these

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<sup>205</sup> This proposed change to *Benchbook* instruction 6-4 is shown in Appendix B.

<sup>206</sup> See LTC Patricia Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections--the Why and How*, ARMY LAW., Mar. 2003, at 10.

<sup>207</sup> MCM, *supra* note 3, R.C.M. 916(k)(1).

<sup>208</sup> LAFAVE, *supra* note 171, § 7.2 (citing A. GOLDSTEIN, THE INSANITY DEFENSE (1967)).

terms.<sup>209</sup> Finally, the *Military Judges' Benchbook* essentially leaves the meaning of these very important terms to panel members' imaginations.<sup>210</sup>

Looking instead to case law, the CAAF grappled with these terms most recently in *United States v. Martin*.<sup>211</sup> The appellant, Major (MAJ) Robert Martin, was an active duty judge advocate who had engaged in a series of criminal activities over a two and one-half year period that generally fell into four categories, “(1) unpaid personal loans, (2) fraudulent investment schemes, (3) unauthorized and incomplete legal services, and (4) worthless checks.”<sup>212</sup> Prior to trial, numerous mental health professionals evaluated the appellant, ultimately concluding that he suffered from bipolar disorder throughout the period of the alleged offenses.<sup>213</sup> The issues before the court were: (1) whether the evidence “clearly and

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<sup>209</sup> S. REP. NO. 98-255 (1983), reprinted in 1984 U.S.C.C.A.N. 3182.

<sup>210</sup> The applicable instruction from the *Military Judges' Benchbook* states, in part, the following:

If you determine that, at the time of the offense(s) . . . , the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct.

If the accused was able to appreciate the nature and quality or the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible; and this is so regardless of whether the accused was then suffering from a severe mental disease or defect, (and regardless of whether (his) (her) own personal moral code was not violated by the commission of the offenses(s)).

(On the other hand, if the accused had a delusion of such a nature that (he)(she) was unable to appreciate the nature and quality or wrongfulness of (his)(her) acts, the accused cannot be held criminally responsible for (his)(her) acts, provided such a delusion resulted from a severe mental disease or defect.)

BENCHBOOK, *supra* note 9, para. 6-4.

<sup>211</sup> 56. M.J. 97 (2001).

<sup>212</sup> *Id.* at 100.

<sup>213</sup> *Id.*

convincingly” established that appellant was not mentally responsible; and, (2) whether the Army Court of Criminal Appeals erred when it required that the evidence demonstrate lack of mental responsibility “at the precise moment” of each of the acts constituting the charged offenses.<sup>214</sup> The court decided the second issue both quickly and easily.<sup>215</sup> The insanity defense requires proof, whether direct or circumstantial, that the elements of the defense existed at the moment of the acts constituting the offense.<sup>216</sup> The first issue, however, required considerably more analysis.

Although the court eventually held that a reasonable panel could have found that MAJ Martin failed to carry his burden of proving lack of mental responsibility,<sup>217</sup> the analysis provides some important insight into how the court interprets the key terms of “appreciate,” “nature and quality,” and “wrongfulness.” Addressing the word “appreciate” first, the court looked to federal case law, the Model Penal Code, and the legislative history of the Insanity Defense Reform Act of 1984.<sup>218</sup> The court noted that to “appreciate” means to have both a cognitive and emotional understanding of the “moral or legal import of

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<sup>214</sup> *Id.* at 99.

<sup>215</sup> *Id.* at 111. The appellant’s strategy at trial was to prove that his lack of mental responsibility had existed throughout the entire two and one-half year period of the alleged offenses, rather than present evidence of insanity at the moment each offense was alleged to have occurred. The court agreed that this would be an acceptable method of establishing lack of mental responsibility, but held that, under the facts of this case, it was reasonable for the panel to conclude that the appellant had failed to meet his burden. *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 107 (citing *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Meader*, 914 F.Supp. 656 (D. Me. 1996); AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01 cmt. 2, at 166 (official draft 1962); S. Rep. No. 225, 98th Cong., 2d. Sess. (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182 n.1).

behavior.”<sup>219</sup> Stated differently, the word “appreciate” connotes more than mere cognitive knowledge that a fact is true; it includes recognition of meaning and significance.<sup>220</sup>

Ultimately, the CAAF accurately recognized the broad meaning of “appreciate” in spite of the fact that neither the Rules for Courts-Martial nor the *Benchbook* reflect that recognition.

For defense counsel, the broad definition of appreciate is important because it increases the scope of the lack of mental responsibility defense. The phrase “legal and moral import” includes the concept of understanding the consequences of one’s actions.<sup>221</sup> This is a high cognitive threshold, making it easier to show that an accused lacks mental responsibility. Unfortunately, if court-martial panel members are unaware of a term’s legal definition, then they will not be able to correctly apply the facts when reaching their conclusion. Therefore, trial defense counsel may wish to request a panel instruction that includes a definition of “appreciate.” An example is shown in Appendix B.

Following the *Martin* court’s discussion of “appreciate,” it turned next to the terms “nature and quality” and “wrongfulness.”<sup>222</sup> Lacking any military case law addressing the subject, the court looked to a learned treatise for an oft-cited explanation of the terms:

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<sup>219</sup> *Martin*, 56 M.J. at 107-08.

<sup>220</sup> See BLACK’S LAW DICTIONARY 97 (17th ed. 1999) (defining appreciate: “to understand the significance or meaning of”). See also HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY 148 (1972) (“Hence, there is near universal agreement that if the *M’Naghten* criterion is to have any relevance, ‘know’ must be interpreted more broadly than mere ability to give a verbally correct answer.”); MODEL PENAL CODE, *supra* note 174, § 4.01 cmt., at 169 (“The use of ‘appreciate’ rather than ‘know’ conveys a broader sense of understanding than simple cognition.”).

<sup>221</sup> “Import” is defined as “consequence or importance.” WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1998).

<sup>222</sup> *Martin*, 56 M.J. at 108.

The first portion [nature and quality] relates to an accused who is psychotic to an extreme degree. It assumes an accused who, because of mental disease, did not know the nature and quality of his act; he simply did not know what he was doing. For example, in crushing the skull of a human being with an iron bar, he believed that he was smashing a glass jar. The latter portion [wrongfulness] of *M'Naghten* relates to an accused who knew the nature and quality of his act. He knew what he was doing; he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God.<sup>223</sup>

From this language, along with that found in two state court cases and the Century Dictionary, the court concluded that “a defendant who is unable to appreciate the nature and quality of his acts is one that does not have mens rea because he cannot comprehend his crimes, including their consequences.”<sup>224</sup> This conclusion is suspect, however, because it confuses the affirmative insanity defense with the doctrine of partial mental responsibility, discussed in Part IV of this paper.<sup>225</sup> It also fails to provide any guidance regarding how the facts of a particular case might demonstrate, or fail to demonstrate, an appreciation for the “nature and quality” of one’s acts.

Ultimately, the term “nature and quality” must be distinct from the concept of mens rea, otherwise the insane accused would be entitled to a full acquittal, rather than the much more onerous consequences of a verdict of not guilty only by reason of lack of mental

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<sup>223</sup> WHARTON’S CRIMINAL LAW, *supra* note 166, § 101, at 17.

<sup>224</sup> Martin, 56 M.J. at 109.

<sup>225</sup> The “defense” of partial mental responsibility is discussed in Section IV of this paper. See LAFAYE, *supra* note 171, ¶ 9.2 (“Under the doctrine referred to as partial responsibility, diminished responsibility, or (somewhat less accurately) partial insanity, recognized in some but not all jurisdictions, evidence concerning the defendant’s mental condition is admissible on the question of whether the defendant had the mental state which is an element of the offense with which he is charged.”); United States v. Berri, 33 M.J. 337 (C.M.A. 1991).

responsibility.<sup>226</sup> At least one legal scholar has observed that the phrase “nature and quality of the act” is “typically held to mean that the defendant must have understood the physical nature and consequences of the Act. Thus, an accused must have known that holding a flame to a building would cause it to burn, or that holding a person’s head under water would cause him to die.”<sup>227</sup> This articulation of “nature and quality,” while admittedly superior to that found in the quoted language from *Martin*, seems to address the same concern that necessitated adoption of a broad definition for “appreciate;” namely, the accused’s awareness of his own conduct must include recognition of the natural consequences of that conduct.<sup>228</sup>

Like the term “appreciate,” military appellate courts have also avoided defining the term “wrongfulness.” The *Martin* court cited a number of federal cases, but never arrived at a conclusion as to its meaning.<sup>229</sup> Without taking a firm position, the court observed, “Other federal circuits recognize that a defendant’s delusional belief that his criminal conduct is

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<sup>226</sup> For an excellent discussion of the intersection of the insanity defense with the doctrine of partial mental responsibility, see FINGARETTE, *supra* note 220, 128-41. After an exhaustive review of the historical development of the insanity defense, as well as the writings of eminent jurists, Professor Fingarette concludes:

[T]he absence of *mens rea* in insanity is of a more profound or radical kind than in the more typical cases where a person lacks . . . the mental state required by the definition of a particular crime. . . . In the more common case of absence of *mens rea* (and blamability), it is implicitly acknowledged that the defendant, though perhaps not criminally guilty, was nevertheless a responsible agent under the law. In the case of the insanity plea . . . the thesis of absence of *mens rea* cuts deeper than this: rather than amounting to a claim to be a responsible person under law who acted without guilty intent, it is in effect a claim that the person was not a responsible agent.

*Id.* at 131.

<sup>227</sup> LAFAYE, *supra* note 171, ¶ 7.2(b) (citations omitted).

<sup>228</sup> See also *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966).

<sup>229</sup> *Martin*, 56 M.J. at 109 (citing *United States v. Hiebert*, 30 F.3d 1005 (8th Cir. 1994), *United States v. Reed*, 997 F.2d 332 (7th Cir. 1993), *United States v. Newman*, 889 F.2d 88 (6th Cir. 1989), *United States v. Dubray*, 854 F.2d 1099 (8th Cir. 1988), and *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966)).

morally or legally justified may establish an insanity defense under federal law.”<sup>230</sup>

Although inconsistent with the Army court’s conclusion on the same question,<sup>231</sup> the CAAF’s recognition that the term “wrongfulness” might include considerations of morality as well as legality is consistent with other federal decisions. For example, in *United States v. Danser*,<sup>232</sup> the District Court for the Southern District of Indiana suggested three possible meanings for the word “wrongfulness:” (1) “legally wrong or contrary to law,” (2) “contrary to public morality,” or (3) “contrary to one’s own conscience.”<sup>233</sup> Although never ruling which definition was correct, the *Danser* court entertained the possibility that “wrongfulness” includes some consideration of morality, whether that of society, the individual, or both.<sup>234</sup>

What then does the term “wrongfulness” mean, and how does a defense attorney argue that his client was unable to “appreciate” the “wrongfulness” of his conduct? Based on the two appellate decisions in *United States v. Martin*, one might conclude that an inability to “appreciate” the “wrongfulness” of one’s conduct means nothing more than the accused

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<sup>230</sup> *Id.* (citing *United States v. Dubray*, 854 F.2d 1099 (8th Cir. 1988)).

<sup>231</sup> In the same case, the Army court stated, “Whether an accused sincerely believes that his conduct is morally justified is not relevant in establishing the affirmative defense, although it may be relevant as a matter in mitigation during sentencing.” *United States v. Martin*, 48 M.J. 820, 825 (Army Ct. Crim. App. 1998), *aff’d*, 56 M.J. 92 (2001). This statement appears to contradict the language from Wharton’s Criminal Law, and quoted by CAAF in *Martin*: “However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God.” *Martin*, 56 M.J. at 108 (quoting 2 Charles E. Torcia, WHARTON’S CRIMINAL LAW § 101 at 17 (15th ed. 1994)). But see FINGARETTE, *supra* note 220, at 154 (“It would undermine the foundations of the criminal law to allow that a person who violated the law should be excused from criminal responsibility just because, in his own conscience, his act was not morally wrong.”).

<sup>232</sup> 110 F. Supp. 807 (S.D. Ind. 1999).

<sup>233</sup> *Id.* at 826. See also *United States v. Segna*, 555 F.2d 226 (9th Cir. 1977) (interpreting the Model Penal Code insanity provision to include the third possibility, the accused’s subjective belief that the conduct did not violate his conscience).

<sup>234</sup> 110 F.Supp. at 826-27.

recognizes that the behavior is unlawful. In other words, ignorance of the law is an excuse, but only if it results from a severe mental disease or defect.<sup>235</sup> On the other hand, issues of morality, whether held by society or the individual, may also be relevant. Ultimately, the question remains unanswered, creating a tremendous opportunity for zealous advocacy by the defense counsel.

As the proceeding discussion reveals, the defense of lack of mental responsibility remains largely undefined. While predictability in the law is undoubtedly preferred, especially for the criminal defendant who must often choose between a plea bargain and an all-or-nothing trial on the merits, defense counsel must be prepared to confront the ambiguity within the standard for lack of mental responsibility. Depending upon the facts of the case, the absence of established definitions for the key terms, “appreciate,” “nature and quality,” and “wrongfulness,” may result in a viable defense where none appeared to exist. Defense counsel should, therefore, aggressively seek to expand the law, where appropriate, by viewing the realm of relevant evidence broadly and requesting tailored panel instructions when appropriate.

Appendix B contains three suggested amendments to *Benchbook* instruction 6-4, each based upon the discussion of the law in this section. The first amendment is a change to the definition of “severe” that omits the phrase “non psychotic behavior disorders and personality disorders.”<sup>236</sup> Although not included in the appendix, the similar definition found

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<sup>235</sup> See FINGARETTE, *supra* note 220, at 153 n.34 (summarizing the position of various legal scholars and courts on the meaning of “wrongfulness”).

<sup>236</sup> The relevant text from Appendix B is the following: “The term severe mental disease or defect can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not,

in RCM 706 should also be amended so that the two are consistent. Absent the required Executive Order to amend RCM 706, defense counsel must carefully question sanity board members to determine whether they correctly applied the legal definition of the term “severe.” The second amendment is a definition for the phrase “appreciate the nature and quality,” which increases the scope of the terms to include an understanding of the significance and meaning of the accused’s acts.<sup>237</sup> The third amendment is a definition for the phrase “appreciate the wrongfulness,” which includes reference to the moral standards of society.<sup>238</sup> Although the law is entirely unsettled in this area, the examination of both history and case law in this section supports a conclusion that “wrongfulness” must include some concept of morality. The suggested definition, therefore, makes reference to an objective standard, the “moral standards of society.” The alternate approach of referring to the accused’s own sense of morality would unacceptably allow the morally bankrupt to excuse their own conduct. Reference to society’s moral standards, admittedly a vague litmus test, at least gives both the government and defense a standard from which to argue. Without clarifying these definitions in the *Benchbook*, both the government and the defense run the risk of letting the factfinder define the terms according to their own views on the scope of the insanity defense.

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in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct ~~or by non-psychotic behavior disorders and personality disorders.~~”

<sup>237</sup> The relevant text from Appendix B is the following: “To appreciate the nature and quality of (his) (her) conduct, the accused must have knowledge that (he) (she) has engaged in the conduct, and an awareness of the legal and moral import of the conduct’s natural consequences.”

<sup>238</sup> The relevant text from Appendix B is the following: “To appreciate the wrongfulness of (his) (her) conduct, the accused must have an emotional awareness that the conduct is contrary to the accepted moral standards of society.”

## B. Procedural Rules Relating to Mental Responsibility

### 1. *Pre-trial and Trial Procedures*

As with competency, the accused is presumed to be mentally responsible for his actions until he establishes lack of mental responsibility by clear and convincing evidence.<sup>239</sup> Prior to trial, the defense must notify the trial counsel of their intent to raise the defense of lack of mental responsibility.<sup>240</sup> As a practical matter, both parties will generally be aware of a potential insanity defense, either from the facts of the case or the report of a sanity board. Nonetheless, lack of mental responsibility is an affirmative defense necessitating formal notice prior to trial.<sup>241</sup> In addition, defense counsel must comply with the RCM 703's provisions regarding witness production and employment of expert witnesses.<sup>242</sup>

At trial, the accused will enter a plea as in any other case - guilty, not guilty, guilty to a lesser included offense, or guilty with exceptions and substitutions.<sup>243</sup> Even in cases where

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<sup>239</sup> MCM, *supra* note 3, R.C.M. 916(k)(3)(A). *See* United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986) (holding that placing the burden on the defendant to prove the insanity defense by clear and convincing evidence does not violate the Constitution).

<sup>240</sup> MCM, *supra* note 3, R.C.M. 701(b)(2).

<sup>241</sup> Rule for Courts-Martial 701(b)(2) does not expressly require written notice; however, the discussion to the rule states that "such notice should be in writing except when impracticable." *Id.* R.C.M. 701(b)(2) discussion. Furthermore, the current Army rules of practice require that, "[u]nless the judge sets a different deadline, defense counsel will notify the trial counsel in writing at least 14 calendar days before trial of the intent to offer the defense of . . . lack of mental responsibility, or the intent to introduce expert testimony as to the accused's mental condition, and of all other notice required by RCM 701(b)(2)." UNITED STATES ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 2b(4) (1 Jan. 2001).

<sup>242</sup> *See* MCM, *supra* note 3, R.C.M. 703.

<sup>243</sup> MCM, *supra* note 3, R.C.M. 910(a)(1).

the accused does not intend to rebut the elements of the offenses, instead focusing exclusively on the insanity defense, the accused may not plead “not guilty only by reason of lack of mental responsibility.”<sup>244</sup> Because a guilty plea has the effect of waiving any defenses,<sup>245</sup> the accused must forego the potential benefits of a pretrial agreement in order to litigate the insanity defense. This choice creates a difficult decision for both the accused and counsel, even when the evidence strongly supports the accused’s lack of mental responsibility.<sup>246</sup> Following the accused’s entry of plea, the trial proceeds in the normal fashion until some evidence of lack of mental responsibility is raised. At that point, the military judge may instruct the panel members on the law regarding the insanity defense.<sup>247</sup>

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<sup>244</sup> *Id.* If, for tactical reasons, the defense wishes to acknowledge the elements of the offenses charged, while preserving the ability to litigate the insanity defense, counsel should consider the option of a confessional stipulation. See MAJ Steven E. Walburn, *Should the Military Adopt an Aford-Type Guilty Plea?*, 44 A.F. L. REV. 119. The decision of whether or not to employ this tactic may depend upon the degree to which the evidence presented on the elements would either support, or refute, insanity. See, e.g., *United States v. Martin*, 56 M.J. 97, 103 (2001) (relying upon the testimony of the victims as evidence that the accused was mentally responsible at the time of the offenses). As always, a stipulation has the advantage of allowing creative counsel to shape the facts to support their case, especially when the government has reason to prefer the ease of stipulation over the burden of witness production.

<sup>245</sup> MCM, *supra* note 3, R.C.M. 910(c)(4), (j) (requiring the accused to admit all elements of the offenses to which he pleaded guilty and waiving any objection to his factual guilt).

<sup>246</sup> This situation could create a dilemma for the military judge as well as counsel. In the hypothetical case where a sanity board finds that the accused is not mentally responsible, but the accused would prefer to plead guilty and accept minimal criminal punishment rather than risk indefinite hospitalization by the Attorney General, it is not clear whether a military judge would be permitted under current law to accept the accused’s plea. *Id.* R.C.M. 910(e) discussion (requiring the military judge to elicit facts from the accused negating any defense potentially raised during the providence inquiry). The question for the military judge would be whether the accused is capable of bringing forth facts to negate the defense, in spite of the sanity board’s findings. A possible solution would be for the accused to enter a pretrial agreement with the convening authority that includes a promise to plead not guilty in return for a sentence limitation, but which also includes a confessional stipulation that admits the elements but negates the defense. Even this tactic might fail, depending on the degree to which the military judge inquires into the facts supporting the stipulation, and whether the judge views this approach as an end run on the providence inquiry.

<sup>247</sup><sup>247</sup> BENCHBOOK, *supra* note 9, para. 6-3. If the accused elects trial by military judge alone, then the applicable instructions in the *Benchbook* will generally not be part of the record, as they are when given to a panel. Those instructions, however, remain highly relevant because they will undoubtedly inform the military judge’s application of the facts to the law during deliberation. Therefore, in a case tried before a military judge sitting alone, the defense counsel should file a motion for clarification of the law that will be applied to the case, just as if requesting a tailored instruction to be given to a panel.

As a practical matter, the panel will likely know from voir dire, and certainly after opening statements, that mental responsibility will be an issue in the case. Thus, the defense counsel may wish to request a preliminary instruction to the panel before the calling of witnesses so that the flow of evidence will not be unnecessarily disrupted. It is important for the defense counsel to remember that the presumption that the accused was mentally responsible at the time of the offenses continues throughout the trial until the accused proves lack of mental responsibility by clear and convincing evidence.<sup>248</sup>

Following the close of evidence, the military judge will instruct the panel on both the law and the voting procedures to be followed when mental responsibility is in issue.<sup>249</sup> The military judge is required to instruct *sua sponte* on the insanity defense when “some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.”<sup>250</sup> During deliberation, the factfinder, whether the military judge or a panel, must engage in a two-step process before a finding of guilty may be entered.<sup>251</sup> The members first vote on whether the government has proven the elements of the offenses beyond a reasonable doubt.<sup>252</sup> If two-thirds of the members answer in the affirmative, then each panel member will cast a vote on whether the accused has proven the insanity defense

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<sup>248</sup> MCM, *supra* note 3, R.C.M. 916(k)(3)(A). Clear and convincing is defined as “that weight of proof which ‘produces in the mind of the factfinder a ‘firm belief or conviction’ that the allegations in question are true.’”

<sup>249</sup> *Id.* R.C.M. 920. The specific instructions are contained in chapter 6 of the *Military Judges’ Benchbook*. BENCHBOOK, *supra* note 9, para. 6-4. See also text at Appendix B.

<sup>250</sup> MCM, *supra* note 3, R.C.M. 920(e)(3) discussion (requiring the military judge to instruct on any special defense under RCM 916 when some evidence has been admitted raising the defense); *id.* R.C.M. 916(a), (k) (defining the defense of lack of mental responsibility as a special defense).

<sup>251</sup> *Id.* R.C.M. 921(c)(4).

<sup>252</sup> *Id.*

by clear and convincing evidence.<sup>253</sup> If a majority of the members find that the accused met his burden, then a finding of not guilty only by reason of lack of mental responsibility will be entered for that specification; otherwise, the accused will be found guilty.<sup>254</sup>

Because the insanity defense must be proven at the specific time at which each offense was alleged to have occurred,<sup>255</sup> voting should be conducted separately for each specification.<sup>256</sup> Theoretically, an accused could be found not guilty of some offenses, guilty of other offenses, and not guilty only by reason of lack of mental responsibility for others.<sup>257</sup> The defense counsel should take note that the panel's vote on mental responsibility requires only a majority, rather than the supermajority required for a finding of guilty.<sup>258</sup>

## 2. *Procedures Following Acquittal Due to Lack of Mental Responsibility*

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See *United States v. Martin*, 56 M.J. 97, 103 (2001) (holding that the accused could theoretically prove insanity at the specific moment of the offense by demonstrating that the condition of insanity existed over an extended period of time encompassing that of the alleged offenses).

<sup>256</sup> MCM, *supra* note 3, R.C.M. 921(c)(4) discussion. This process is accurately described in paragraph 6-7 of the *Military Judges' Benchbook*. BENCHBOOK, *supra* note 9, para. 6-7.

<sup>257</sup> Given the general practice in courts-martial of alleging all known serious offenses at the time of charging, the possibility of such disparate findings is certainly not unlikely. See MCM, *supra* note 3, R.C.M. 307(c)(4). The procedures that will be discussed in the following paragraphs, however, fail to account for this possibility, i.e. disposition of an accused who has been sentenced to confinement on one charge, but for whom involuntary commitment is appropriate because of a successful insanity defense on another charge.

<sup>258</sup> UCMJ art. 50a(e) (2002). A finding of guilty requires the affirmative vote of two-thirds of the members, unless the death penalty is mandatory, in which case the vote must be unanimous. MCM, *supra* note 3, R.C.M. 921(c)(2).

Following a finding of not guilty only by reason of lack of mental responsibility, the accused will be committed to a “suitable facility.”<sup>259</sup> A “suitable facility” must have the capability of providing care and treatment to the accused, taking into consideration the nature of both the accused and the offenses committed.<sup>260</sup> “Suitable facilities” are maintained by the Federal Bureau of Prisons under the supervision of the U.S. Attorney General; however, the general court-martial convening authority does not have the authority to commit the servicemember to the custody of the Attorney General until after the court-martial conducts a post-trial hearing regarding the accused’s risk to society.<sup>261</sup> As a practical matter, the defense counsel should ensure that “suitable facility” is not, because of inadequate government resources, interpreted to be a jail cell.<sup>262</sup> A “suitable facility” must be something other than a jail cell and may often turn out to be the nearest military inpatient psychiatric ward, supplemented by military guards from the servicemember’s unit, if necessary.

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<sup>259</sup> UCMJ art. 76b(b)(1); MCM, *supra* note 3, R.C.M. 1107(b)(4) (“When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority . . . shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1102A.”).

<sup>260</sup> 18 U.S.C. § 4247(a)(2) (2000). This section is made applicable to the armed services by Article 76b(c)(1), UCMJ. UCMJ art. 76b(c)(1).

<sup>261</sup> Article 76b(b), UCMJ, does not authorize the convening authority to commit the servicemember to the custody of the Attorney General until after the court-martial finds that his release would create “a substantial risk of bodily injury to another person or serious damage of property of another.” UCMJ art. 76b(b)(4). The discussion following R.C.M. 1107(b)(4) states, “Commitment of the accused to the custody of the Attorney General is discretionary.” MCM, *supra* note 3, R.C.M. 1107(b)(4) discussion.

<sup>262</sup> See U.S. DEP’T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 3-2d (5 Apr. 2004). “Hospitalized prisoners will be placed in a specifically designated medical treatment area for proper custody and control unless the hospital commander directs otherwise.” *Id.* “Custody and control of hospitalized pretrial prisoners and OCONUS post-trial prisoners are the responsibility of the prisoner’s parent unit commander. Inpatient psychiatric prisoner patients may be treated only in a military, Department of Veterans Affairs, State, or Federal prison approved by DAPM.” *Id.* para. 11-12. Further guidance for disposition of Army personnel who are found to be mentally incompetent or not guilty because of lack of mental responsibility is found in paragraph 3-4b(1). *Id.*

The remaining procedures to be followed are set out in RCM 1102A,<sup>263</sup> which implements Article 76b(b), UCMJ.<sup>264</sup> Within forty days of the court-martial entering findings, the military judge must conduct a hearing to determine whether release of the servicemember would “create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect.”<sup>265</sup> Prior to the hearing, the servicemember will undergo a psychiatric or psychological examination ordered by the military judge or general court-martial convening authority, with the resulting report going to the military judge for consideration at the post-trial hearing.<sup>266</sup> The servicemember is entitled to representation by defense counsel, “to testify, to present evidence, to call witnesses on his or her behalf,<sup>267</sup> and to confront and cross-examine witnesses who appear at the hearing.”<sup>268</sup> The right to call witnesses would presumably include expert witnesses who may or may not agree with the report provided pursuant to the court-ordered examination. At the hearing, the burden of persuasion is upon the servicemember, with the standard determined by the nature of the offenses that resulted in the verdict.<sup>269</sup> If the relevant offenses involved “bodily injury to another, or serious damage to the property of another, or . . . a substantial risk of such injury or damage,” then the servicemember has the burden of

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<sup>263</sup> MCM, *supra* note 3, R.C.M. 1102A.

<sup>264</sup> UCMJ art. 76b(b) (2002).

<sup>265</sup> MCM, *supra* note 3, R.C.M. 1102A. The provisions of RCM 1102A, as well as those that follow, mirror the federal statutes for hospitalization of a defendant following a finding of not guilty only by reason of insanity. *Id.* R.C.M. 1102A analysis at A21-81. *See* 18 U.S.C. §§ 4243, 4247 (2000).

<sup>266</sup> *Id.* R.C.M. 1102A(b).

<sup>267</sup> This includes the right to have witnesses subpoenaed. *See* 18 U.S.C. § 4247(d).

<sup>268</sup> MCM, *supra* note 3, R.C.M. 1102A(c)(1).

<sup>269</sup> *Id.* R.C.M. 1102A(c)(3).

proof by clear and convincing evidence that his release would not create “a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect.”<sup>270</sup> For any other offenses, the servicemember has the burden of proof by a preponderance of the evidence.<sup>271</sup>

If the military judge finds that release of the servicemember would not violate the standard set out above, then the “military judge shall inform the general court-martial convening authority . . . and the accused shall be released.”<sup>272</sup> If the military judge finds the contrary, than he shall notify the general court-martial convening authority who may commit the accused to the custody of the Attorney General.<sup>273</sup> The Attorney General is required to hospitalize the servicemember under the provisions of 18 U.S.C. § 4243.<sup>274</sup> Once a servicemember has been hospitalized under the procedure described above, his continued hospitalization will be overseen by the U.S. district court for the district in which he is hospitalized.<sup>275</sup>

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* R.C.M. 1102A(c)(4).

<sup>273</sup> *Id.* There is an inconsistency in the fact that involuntary hospitalization is discretionary after a finding that the accused has both committed the offense and is dangerous; whereas hospitalization, albeit temporary, is mandatory after a finding that the accused lacks mental capacity but there has been no finding of either wrongdoing or dangerousness. *Id.* R.C.M. 909(f).

<sup>274</sup> UCMJ art. 76b(b)(4)(B) (2002).

<sup>275</sup> UCMJ art. 76b(b)(5). The servicemember will remain hospitalized until such time as the director of the treatment facility determines that he “has recovered from his mental disease or defect to such an extent that his release . . . would no longer create a substantial risk of bodily injury to another person or serious damage to property of another.” 18 U.S.C. § 4243(f). If the appropriate authority determines that the individual meets this

Notwithstanding the detrimental consequences of a finding of not guilty only by reason of lack of mental responsibility (social stigma and involuntary hospitalization), the post-trial review procedures are generally the same as those for an acquittal.<sup>276</sup> However, there is not a rational basis for applying the same procedures to both, and the accused—still burdened by the consequences of trial—loses several important safeguards: (1) the accused is denied a factual record of the proceedings;<sup>277</sup> (2) the convening authority has no ability to review the trial for legal and factual error;<sup>278</sup> and (3) the accused does not have access to an appellate review of the proceedings.<sup>279</sup> In the circumstance where the accused is otherwise guilty of the crime,<sup>280</sup> but for his successful insanity defense, these problems do not seem like problems at all. After all, how can the accused complain about not being able to appeal a favorable verdict?<sup>281</sup> The answer is that, logically, mentally insane individuals may be just as likely to be wrongly accused of a crime as are sane individuals. However, in the case where

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standard, then the government is given an opportunity to litigate in district court whether the individual should be released, applying the same standard used to justify the original hospitalization.

<sup>276</sup> See MCM, *supra* note 3, R.C.M. 1103(e), 1107(b)(4).

<sup>277</sup> See *id.* R.C.M. 1103(e) (requiring preparation of only a summarized record of trial).

<sup>278</sup> See *id.* R.C.M. 1107(b)(4) (prohibiting the general court-martial convening authority from disapproving the findings).

<sup>279</sup> UCMJ art. 66.

<sup>280</sup> This phrase is meant to refer to an accused who actually committed the crime, in contrast to the accused who is found to have committed the crime as a result of legal error in the trial. Because the voting procedures used in insanity cases require an affirmative finding that the accused committed the elements before the factfinder determines whether the accused proved lack of mental responsibility, every case where the accused is found not guilty only by reason of lack of mental responsibility will necessarily include a finding that the accused committed the elements of the crime. See *supra* note 251-254 and accompanying text. The problem that this paragraph attempts to highlight is the complete lack of procedures to guarantee the reliability of the first finding in the bifurcated procedure.

<sup>281</sup> Those who might ask this question assume that the accused was seeking a finding of not guilty only by reason of lack of mental responsibility rather than a full acquittal. Such an assumption may hold true in some cases, but certainly not all.

the insane individual is wrongly accused, and later found not guilty only by reason of insanity, he lacks the ability to contest the factual or legal sufficiency of the trial process; whereas, the sane individual has complete access to the appellate process. For example, if a misapplication of law at trial results in a straight finding of guilty, the general court-martial convening authority has the authority to disapprove the findings and dismiss the charges;<sup>282</sup> or the servicemember has the possibility of receiving relief following appellate review.<sup>283</sup> If the same legal error at trial results in a finding of not guilty only by reason of lack of mental responsibility, the convening authority is expressly prohibited from disapproving the findings, and the servicemember is not entitled to any appellate review.<sup>284</sup> Although the convening authority could attempt to rectify the legal error by not committing the servicemember to the custody of the Attorney General, the servicemember has no ability to advocate for such relief because he is neither entitled to a verbatim record of trial nor the right to present post-trial submissions.<sup>285</sup>

One possible argument that defense counsel might consider is that the difference in post-trial review procedures between servicemembers found guilty and those found not guilty only by reason of lack of mental responsibility is irrational, thus violating the Equal

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<sup>282</sup> *Id.* R.C.M. 1107(c).

<sup>283</sup> *Id.* R.C.M. 1203, 1204, and 1205 (authorizing appellate review by the Army Court of Criminal Appeals, Court of Appeals for the Armed Forces, and Supreme Court of the United States).

<sup>284</sup> *Id.* R.C.M. 1107(b)(4). Although certainly not as advantageous as a right to a direct appeal, § 4247 of title 18, United States Code, preserves the individual's right to seek a writ of habeas corpus in federal district court. 18 U.S.C. § 4247 (2000).

<sup>285</sup> MCM, *supra* note 3, R.C.M. 1105(a) (limiting the right to submit post-trial matters to the convening authority to cases in which a sentence has been adjudged).

Protection Clause.<sup>286</sup> Under the Supreme Court's equal protection jurisprudence, government action will not violate the Equal Protection Clause if the classification is "rationally related to a legitimate government purpose."<sup>287</sup> The defense's argument is that there is no rational basis for giving fewer post-trial rights to an individual found not guilty only by reason of lack of mental responsibility than to an individual found guilty. The government has an inherent interest in discovering and remedying trial defects, regardless of whether the defects result in confinement or involuntary commitment. Unfortunately this interest is actually thwarted by the Rules unfavorable treatment of servicemembers found not guilty by reason of mental responsibility. This argument is also supported by Supreme Court precedent, *Vitek v. Jones*, in which the Court recognized:

The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that [whether] we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.<sup>288</sup>

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<sup>286</sup> U.S. CONST. amend. XIV ("No State shall . . . deny any person within its jurisdiction the equal protection of the laws."). The Equal Protection Clause applies to actions by the federal government via the Fifth Amendment. *See* *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (tracing the history of the application of equal protection doctrine through the Fifth Amendment); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the equal protection provisions of the Fourteenth Amendment to the federal government via the Due Process Clause of the Fifth Amendment).

<sup>287</sup> This is the legal standard when the government action does not impact a suspect class, such as race or national origin. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *United State v. Gray*, 51 M.J. 1, 22 (1999) (requiring that "reasonable grounds exist" for a government classification that does not impact a protected class).

<sup>288</sup> *Vitek v. Jones*, 445 U.S. 480 (citing *Addington v. Texas*, 441 U.S. 418 (1979)). For another example of how insanity acquittees are adversely affected by the findings, *see Jones v. United States*, 463 U.S. 354 (1983), holding that the determination by a criminal court that the insanity acquittee committed the elements of the crime is sufficient evidence of dangerousness to warrant a different standard for involuntary commitment than that guaranteed for civil commitment.

Although none of the Supreme Court cases discussed earlier directly address an individual's right to an appellate process following a finding of not guilty because of insanity, the equal protection argument framed above has sufficient merit to warrant attention in a habeas proceeding authorized under 18 U.S.C. § 2427.<sup>289</sup>

#### IV. Evidence Negating Mens Rea v. Partial Mental Responsibility

Evidence of mental illness, whether presented by expert or lay witnesses, is not limited to the affirmative defense of lack of mental responsibility. To the contrary, theories under which evidence of mental illness may rebut the government's proof of mens rea, but still fall short of proving insanity, have a tortured history within the military justice system. The end result is a doctrine that is both misunderstood and confusing. Before discussing the law as it exists today, it is necessary to cover some recent history regarding the doctrine of partial mental responsibility.

##### A. History of the Doctrine of Partial Mental Responsibility

Within the military justice system, the doctrine of partial mental responsibility finds its origins in *United States v. Kunak*,<sup>290</sup> a case in which the court held that the panel members must be appropriately instructed if there is evidence that the accused possessed a mental

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<sup>289</sup> See also *Douglas v. California*, 372 U.S. 353 (1963) (holding that the Equal Protection Clause guaranteed indigent defendant's the right to the assistance of counsel for their first appeal of right); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that the Equal Protection Clause and the Due Process Clause guaranteed indigent defendants access to a trial transcript for use in preparing an appeal).

<sup>290</sup> 17 C.M.R. 346 (C.M.A. 1954)

illness short of insanity that might have interfered with his capacity to premeditate.<sup>291</sup>

Although never actually appearing in the UCMJ, the doctrine continued to evolve, eventually allowing an accused to present evidence of mental illness to rebut any subjective state of mind required by a crime, including premeditation, specific intent, willfulness, or knowledge.<sup>292</sup> The doctrine first appeared in the *1969 Manual for Courts-Martial*, which stated:

Partial mental responsibility. A mental condition, not amounting to a general lack of mental responsibility (120b), which produces a lack of mental ability, at the time of the offense, to possess actual knowledge or to entertain a specific intent or a premeditated design to kill, is a defense to an offense having one of these states of mind as an element.<sup>293</sup>

In general, the paragraph above is a fair statement of the general concept referred to as partial mental responsibility, sometimes referred to as partial responsibility, diminished capacity, or partial insanity.<sup>294</sup> The *1984 Manual for Courts-Martial*, although reorganized into the Rules for Courts-Martial that we recognize today, contained a substantially similar provision.<sup>295</sup> As

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<sup>291</sup> *Id.* at 362.

<sup>292</sup> See, e.g., *United States v. Vaughn*, 49 C.M.R. 747, 750 (C.M.A. 1975) (holding that the doctrine of partial mental responsibility could reduce a premeditated murder charge all the way to involuntary manslaughter); *United States v. Walker*, 43 C.M.R. 81, 86 (C.M.A. 1971) (upholding the lower court's reversal because they were "not convinced beyond a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill.")

<sup>293</sup> 1969 MCM, *supra* note 13, ¶ 120c.

<sup>294</sup> See generally LAFAVE, *supra* note 171, at ¶ 9.2.

<sup>295</sup> In the *1984 Manual for Courts-Martial*, RCM 916(k)(2) stated:

Partial mental responsibility. A mental condition not amounting to a general lack of mental responsibility under subsection (k)(1) of this rule but which produces a lack of mental ability at the time of the offense to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defense to an offense having one of these states of mind as an element.

1984 MCM, *supra* note 178, R.C.M. 916(k)(2).

stated above, the doctrine of partial mental responsibility fell clearly within the category of substantive defenses that serve to excuse, rather than negate, the defendant's otherwise criminal conduct.<sup>296</sup>

The Military Justice Amendments of 1986, following on the heels of the Insanity Defense Reform Act of 1984, made significant changes in the law of insanity, including the defense of partial mental responsibility. Specifically, RCM 916(k)(1) and (2) were amended to conform with the changes in Article 50a(a), UCMJ.<sup>297</sup> In contrast to the earlier language found in the 1969 and 1984 *Manuals for Courts-Martial*, the new RCM 916(k)(2) stated:

*Partial mental responsibility.* A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.<sup>298</sup>

Both the effect, and the intent, of this new RCM 916(k)(2) was the abolition of the defense of partial mental responsibility as it had previously existed.<sup>299</sup> Unlike the changes in RCM 916(k)(1), which amounted to a substantial restatement of Article 50a(a), UCMJ, the changes to RCM 916(k)(2) drew their only support from the legislative history of the Insanity Defense Reform Act of 1984.<sup>300</sup> In 1988, however, the COMA ruled in *Ellis v. Jacob*<sup>301</sup> that

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<sup>296</sup> See *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977) (holding that lack of mental responsibility and partial mental responsibility are substantive defenses).

<sup>297</sup> See *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 916(k) analysis, at A21-62 (1998).

<sup>298</sup> *Id.* RCM 916(k)(2).

<sup>299</sup> *Id.* R.C.M. 916(k) analysis, at A21-62.

<sup>300</sup> *Id.*

<sup>301</sup> 26 M.J. 90 (C.M.A. 1988).

Article 50a(a) did not bar the accused from presenting psychiatric evidence for the purpose of rebutting specific intent.<sup>302</sup> Three years later, the COMA reiterated this conclusion, stating in *United States v. Berri*,<sup>303</sup> “If admissible evidence suggests that the accused, for whatever reason, including mental abnormality, lacked mens rea, the factfinder must weigh it along with any evidence to the contrary.”<sup>304</sup> Together, these two cases effectively overruled RCM 916(k)(2) as a statement of law. Effective 3 January 2004, the President put the final nail in the coffin by amending RCM 916(k)(2) to state the following: “*Partial mental responsibility*. A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not an affirmative defense.”<sup>305</sup>

Although legal commentators,<sup>306</sup> and arguably the Army Court of Criminal Appeals,<sup>307</sup> interpreted *Ellis v. Jacob* and *United States v. Berri* as resurrecting the doctrine of partial mental responsibility, that conclusion is unsupported by the cases themselves.<sup>308</sup> It

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<sup>302</sup> *Id.* at 93.

<sup>303</sup> 33 M.J. 336 (C.M.A. 1991).

<sup>304</sup> *Id.* at 343 n.11.

<sup>305</sup> Exec. Order. No. 13365, 69 Fed. Reg. 71333 (Dec. 8, 2004).

<sup>306</sup> See Lieutenant Colonel Donna M. Wright, “*Though this be madness, yet there is method in it*”: *A Practitioner's Guide to Mental Responsibility and Competency to Stand Trial*, ARMY LAW., Sept. 1997, at 26 (concluding that *Ellis v. Jacob* and *United States v. Berri* restored the accused’s ability to present evidence of partial mental responsibility); *Criminal Law Note: The Court of Military Appeals Reestablishes the Limited Defense of Partial Mental Responsibility*, ARMY LAW., July 1988, at 60.

<sup>307</sup> See *United States v. Tarver*, 29 M.J. 605, 608 (A.C.M.R. 1989) (“The Court [*Ellis v. Jacob*] reasoned that precluding attacks on the mens rea elements required to be proved by the government raised both constitutional issues and issues related to the President's rule making authority but held that these issues need not be addressed because it was clear that Congress had no intention of negating mens rea attacks in the form of diminished mental capacity.”).

<sup>308</sup> See *infra* notes 312-324 and accompanying text.

is further called into question by the recent amendment of RCM 916(k)(2), which did anything but restore the provision to the language that appeared in the 1969 and 1984 *Manuals for Courts-Martial*.<sup>309</sup> If fact, a cursory read of the *Ellis* and *Berri* opinions reveals that the COMA never referred to the permissible use of evidence of mental illness as partial mental responsibility or any of the many variants of that phrase.<sup>310</sup> Rather, the *Ellis* opinion relied heavily upon the interpretation that other federal courts had given 18 U.S.C. § 20.<sup>311</sup> The court expressly noted that “[t]he three decisions that have squarely addressed this issue are very clear in distinguishing attacks on *mens rea* from diminished-capacity defenses.”<sup>312</sup> Assuming that the phrase “diminished-capacity defense” is interchangeable with “partial mental responsibility,” an assumption that is supported by the way in which legal scholars use the terms,<sup>313</sup> the COMA did not restore the defense of partial mental responsibility. In fact, the court went to great lengths to distinguish the affirmative defense of partial mental responsibility from the very different purpose of negating *mens rea*.

To understand the rulings in *Ellis* and *Berri*, one must look at the supporting case law, namely, *United States v. Pohlot*.<sup>314</sup> In *Pohlot*, the Third Circuit Court of Appeals addressed the question of whether “evidence of a criminal defendant’s mental abnormality is admissible

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<sup>309</sup> See *supra* notes 293-295 and accompanying text.

<sup>310</sup> See *infra* note 294 and accompanying text.

<sup>311</sup> *Ellis v. Jacob*, 26 M.J. 90, 93 (C.M.A. 1988) (citing *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988)).

<sup>312</sup> *Id.*

<sup>313</sup> See LAFAVE, *supra* note 171, at ¶ 9.2; WHARTON’S CRIMINAL LAW, *supra* note 166, § 107; Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

<sup>314</sup> 827 F.2d 889 (3d Cir. 1987).

to prove the defendant's lack of specific intent to commit an offense, following the passage of the Insanity Defense Reform Act of 1984.”<sup>315</sup> At trial, the defendant presented evidence of mental illness in support of his asserted defense of lack of mental responsibility, and also to rebut his specific intent to commit murder.<sup>316</sup> In deciding the case, the court came to a number of significant conclusions. First, “although Congress intended § 17(a) [Article 50a(a), UCMJ] to prohibit the defenses of diminished responsibility and diminished capacity, Congress distinguished those defenses from the use of evidence of mental abnormality to negate specific intent or any other mens rea, which are elements of the offense.”<sup>317</sup> Second, the evidence presented by the defendant “and effectively excluded by the district court from the jury’s consideration of mens rea could not, even if believed, demonstrate that Pohlott lacked the specific intent to contract for the killing of his wife.”<sup>318</sup> And third, the defendant’s “request for the jury to consider evidence of mental abnormality other than in the context of insanity therefore amounted to a request for a diminished responsibility defense that Congress has abolished.”<sup>319</sup>

A fair reading of these conclusions is that the court believed that Congress had effectively abolished the defenses of diminished responsibility and diminished capacity, thus supporting their holding excluding the evidence. In doing so, however, the court distinguished the affirmative defense of partial mental responsibility from the accused’s

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<sup>315</sup> *Id.* at 890.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 890-91.

ability to present evidence relevant to his state of mind. Quoting from the legislative history of the Insanity Defense Reform Act of 1984, the *Pohlot* court stated:

The use of mental disorder to negate mental state elements of crimes should not be confused with the “diminished capacity” defense as developed by the California courts during the 1960’s and 1970’s. Under that doctrine, a defendant could escape responsibility for a crime by demonstrating not that he or she lacked a required specific intent, but rather that his or her capability of entertaining that intent was not, because of mental disorder, commensurate with that of nondisordered persons.<sup>320</sup>

Interestingly, the description of diminished capacity in the quoted language above is essentially the same as the doctrine of partial mental responsibility as found in the 1969 and 1984 *Manuals for Courts-Martial*.<sup>321</sup> This observation reinforces the conclusion that the terms should be viewed as synonymous, at least with regard to the *Pohlot* court’s analysis of 18 U.S.C. § 17. Finally, an entire section of the *Pohlot* opinion is dedicated to “Differentiating Mens Rea from Diminished Responsibility,”<sup>322</sup> a task that belies any conclusion that the opinion somehow supports a “resurrection” of the doctrine of partial mental responsibility.

Thus, the only logical conclusion to draw from *Ellis* and *Berri*, as supported by *Pohlot*, is that a military accused may present evidence of mental illness to demonstrate that he lacked the mens rea required by the charged offense, but that Congress effectively abolished the substantive defense of partial mental responsibility when it adopted Article

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<sup>320</sup> *Id.* at 898 (citing H.R. Rep. No. 98-577, 98th Cong. 1st Sess. 15 n.23 (1983)).

<sup>321</sup> See *supra* notes 293-295 and accompanying text.

<sup>322</sup> *Id.* at 903.

50a(a), UCMJ.<sup>323</sup> Furthermore, the President's recent amendment of R.C.M. 916(k)(2) makes clear that evidence of mental illness may not otherwise be offered as an affirmative defense, a classification that has historically applied to the doctrine of partial mental responsibility.<sup>324</sup> For defense counsel, the primary significance of this conclusion, as will be explained below, is that the instructions in the *Military Judges' Benchbook* for evidence negating mens rea and partial mental responsibility are both incorrect.<sup>325</sup>

B. Partial Mental Responsibility after *Ellis v. Jacob*

What remains after abolition of the partial mental responsibility defense is an evidentiary rule that is undefined by the *Manual for Courts-Martial* and described only by the appellate court's decisions in *Ellis* and *Berri* and the various federal cases cited in support of those opinions.<sup>326</sup> The resulting concept is easily stated. The accused may present evidence of mental disease or defect, either through expert or lay testimony, to rebut the government's proof that the accused possessed the mens rea required by the charged offense. Stated in this form, the concept is more akin to a specific rule of relevance, much like that

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<sup>323</sup> The last sentence of Article 50a(a), UCMJ, states, "Mental disease or defect does not otherwise constitute a defense." UCMJ art. 50a(a) (2002). The *Pohlot* court interpreted this language, which also appears as the last sentence of 18 U.S.C. § 17, as implementing Congress's intent to abolish only affirmative defenses. 827 F.2d at 898.

<sup>324</sup> See *supra* notes 290-296 and accompanying text.

<sup>325</sup> See *infra* Part IV.C.

<sup>326</sup> See *United States v. Berri*, 33 M.J. 337, 342 (C.M.A. 1991) ("Regarding the elements of the offenses, the precise question was . . . does the psychiatric testimony make it 'more probable' or 'less probable' that the accused formed the necessary 'specific intent' to be found guilty 'beyond a reasonable doubt' of the charged offenses.").

found in Military Rule of Evidence (MRE) 412<sup>327</sup> and MRE 707.<sup>328</sup> The distinction between partial mental responsibility and the evidentiary concept stated above is extremely significant.<sup>329</sup>

First, the doctrine of partial mental responsibility, as it existed prior to *Berri*, was a substantive defense that could only be changed by Congress.<sup>330</sup> In contrast, the evidentiary concept described above is subject to the President's Article 36 authority because it is essentially a rule of relevance,<sup>331</sup> limited only by constitutional considerations.<sup>332</sup> Second, the evidentiary rule does not require a showing of incapacity; rather, it only requires that the evidence be relevant to whether the accused possessed the criminal mens rea at the moment of the offense. This distinction is the most significant to the practitioner. To illustrate, suppose the defense calls a psychiatrist who testifies that the accused suffered from an acute mental disorder making it extremely difficult for him to form the intent to carry out the

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<sup>327</sup> MCM, *supra* note 3, MIL. R. EVID. 412 (defining when evidence of a sexual assault victim's behavior or sexual predisposition will be relevant). See *United States v. Andreozzi*, 60 M.J. 727 (Army Ct. Crim. App. 2004) (stating that MRE 412 is "intended to 'safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping'").

<sup>328</sup> *Id.* MIL. R. EVID. 707 (creating a blanket exclusion of evidence of the results of a polygraph examination). See also *United States v. Scheffer*, 523 U.S. 303 (1998) (upholding the President's authority under Article 36, UCMJ, to prescribe an evidentiary rule (RCM 707) that categorically excludes certain types of minimally relevant evidence).

<sup>329</sup> For an excellent discussion of the distinction between partial mental responsibility and psychiatric evidence relevant to mens rea, see *Morse*, *supra* note 313.

<sup>330</sup> See *United States v. Frederick*, 3 M.J. 230 (1977).

<sup>331</sup> See *Scheffer*, 523 U.S. at 46.

<sup>332</sup> See, e.g. *Rock v. Arkansas*, 483 U.S. 44, 46 (invalidating a state statute that prohibited the defendant from presenting hypnotically refreshed testimony because it effectively barred the defendant from presenting her only available defense); *Washington v. Texas*, 388 U.S. 14 (1967) (holding that a Washington rule of evidence that prohibited the defendant from presenting exculpatory testimony from a co-defendant violated the Sixth Amendment); *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir. 1978) (holding that exclusion of psychiatric evidence relevant to whether the defendant possessed specific intent violated the Due Process Clause).

complex acts that resulted in the alleged crime. On cross-examination, the psychiatrist is forced to admit that, although highly unlikely, it was not impossible for the accused to form intent. On this evidence, the defense has arguably failed to demonstrate incapacity, thereby making the doctrine of partial mental responsibility inapplicable. However, the defense has very effectively demonstrated reasonable doubt as to whether the accused actually possessed the mens rea necessary for him to be guilty. The impact of this evidence on the factfinder will largely be determined by the substance of the trial instructions. Unfortunately, neither the *Military Judges' Benchbook* nor military appellate decisions since *Berri* have captured the distinction illustrated above.

A number of appellate decisions since *Berri* have mentioned the use of mental illness to rebut mens rea.<sup>333</sup> One example is *United States v. Schap*,<sup>334</sup> in which the appellant presented a heat of passion defense to a charge of premeditated murder.<sup>335</sup> On appeal, one of the issues was whether the military judge improperly instructed the panel by giving the partial mental responsibility instruction from the *Benchbook*.<sup>336</sup> Citing the opinions in *Ellis* and *Berri*, the CAAF held that the instruction given

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<sup>333</sup> See, e.g., *United States v. Kreutzer*, 59 M.J. 773 (2004) (stating that the defense counsel's failure to discover and present evidence of mental illness was relevant to the accused's "diminished capacity to form the requisite intent"); *United States v. Tarver*, 29 M.J. 605 (A.C.M.R. 1989) (resurrecting the diminished capacity language by interpreting *Ellis v. Jacob*, 26 M.J. 91 (C.M.A. 1988), to mean that "Congress had no intention of negating mens rea attacks in the form of diminished mental capacity").

<sup>334</sup> 49 M.J. 317 (1998).

<sup>335</sup> *Id.* at 322.

<sup>336</sup> *Id.* The language of the panel instruction quoted by the court is the same as that currently found in paragraph 5-17 of the *Military Judges' Benchbook*.

was the very embodiment of the theory upon which the entire defense case was predicated—that because of appellant’s agitated state of mind as a result of his discovery of his wife’s infidelity, he was so reasonably provoked and in such a sudden heat of passion that he could not have premeditated murder or that, even if his acts were intentional, they were partially excusable due to his state of mind.

This holding implies two things: (1) the court, although citing to *Ellis* and *Berri*, did not recognize the distinction between partial mental responsibility and evidence negating mens rea; and (2) the court continued to view the doctrine as one of excuse, rather than a failure of proof. These two errors are significant because, as will be argued below, they support the continued use of a panel instruction that unnecessarily requires the accused to produce evidence of incapacity and improperly links evidence negating mens rea (a defense of failure of proof) to lack of mental responsibility (a defense of excuse).<sup>337</sup>

C. Proposed Changes to the *Military Judges’ Benchbook*

*Benchbook* instructions 5-17, titled Evidence Negating Mens Rea, and 6-5, titled Partial Mental Responsibility, require the government to prove that the accused is mentally capable of forming the *mens rea* required by the offense charged.<sup>338</sup> In other words, a successful defense based on partial mental responsibility requires the accused to raise a reasonable doubt about his mental capacity. The key word in this instruction, and the one that makes it an incorrect statement of the law, is capacity. The relevant issue for the

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<sup>337</sup> See LAFAVE, *supra* note 171, § 9.1(b) ([T]oday it may be said without qualification that the partial responsibility defense is of the failure of proof type, for what is involved is using mental illness to negate a required mental state.”).

<sup>338</sup> BENCHBOOK, *supra* note 9, paras. 5-17, 6-5. The complete text of instruction 5-17, with proposed amendments, is at Appendix C.

factfinder is not whether the accused was mentally capable of forming mens rea, but whether he actually possessed the required mens rea.<sup>339</sup> Stated another way, an accused who is incapable of forming a specific mens rea will *a fortiori* not possess that mens rea; however, the fact that an individual merely has the capacity to form a specific mens rea does not prove that he necessarily possessed it at any given moment. As illustrated by the example earlier in this section, circumstances may arise where the defense has simply failed to present evidence that the accused had an incapacity to form mens rea; but, yet, the evidence could be very persuasive that a mental disease or defect resulted in his failure to possess a criminal mens rea at the time of the criminal act. *Benchbook* instructions 5-17 and 6-4, as currently written, fail to incorporate the significant changes of *Ellis* and *Berri* and, therefore, must be amended to make clear that the relevant legal issue is whether the accused possessed a criminal mens rea, and not whether he had the capacity to possess a criminal mens rea. *Benchbook* instruction 5-17, shown in Appendix C, capture this very important distinction.

The second problem, although much less significant, is that both instructions limit the relevance of evidence to specific intent, knowledge, and willfulness.<sup>340</sup> This limitation comes directly from the doctrine of partial mental responsibility<sup>341</sup> and is inconsistent with the general concept of allowing the accused to present all evidence necessary to establish a

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<sup>339</sup> See LAFAVE, *supra* note 171, § 5.1.

<sup>340</sup> BENCHBOOK, *supra* note 9, paras. 5-17, 6-5. Although the text of the instructions includes a blank in which to insert the mens rea, the prefatory language limits relevance to the elements of premeditation, specific intent, knowledge, or willfulness, citing *Ellis v. Jacob* and *United States v. Berri*.

<sup>341</sup> See *United States v. Kunak*, 17 C.M.R. 346, 365 (1954) (“While a mental disorder, something less than insanity, may interfere with the ability to premeditate, it does not exonerate an accused from the commission of a crime involving only a general intent.”).

defense.<sup>342</sup> In *United States v. Pohlot*, the Court of Appeals noted that Congress, in debating what is now 18 U.S.C. § 17(a), distinguished between the defense of diminished responsibility and “the use of evidence of mental abnormality to negate specific intent *or any other mens rea*.”<sup>343</sup> The *Berri* opinion likewise noted the possibility that evidence of mental illness could be offered to rebut a general intent crime, but declined to address the issue because the record contained insufficient evidence.<sup>344</sup> And although *Berri* cannot be read as supporting a conclusion that evidence of mental illness may be relevant to rebut general intent, it certainly does not foreclose the possibility. Ultimately, the issue of whether psychiatric evidence is relevant to the accused’s possession of general intent must be resolved by examining the ability of psychiatrists or psychologists to offer a reliable opinion on the matter.<sup>345</sup> Although it is difficult to imagine a circumstance where the accused’s mental illness would be so severe as to rebut general intent, and yet not amount to an insanity defense, the possibility should not be ignored by the inapposite reference to the abolished doctrine of partial mental responsibility. General intent is defined in Black’s Law Dictionary as “usually tak[ing] the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence).”<sup>346</sup> Theoretically, mental illness could have an effect on an individual’s actual awareness

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<sup>342</sup> See cases cited *supra* note 332.

<sup>343</sup> *United States v. Pohlot*, 827 F.2d 889, 890 (3d Cir. 1987) (emphasis added). Compare *United States v. Gonyea*, 140 F.3d 649 (6th Cir. 1988) (basing decision upon a conclusion that the defense of diminished capacity does not apply to general intent crimes).

<sup>344</sup> *United States v. Berri*, 33 M.J. 337, 339 n.3 (C.M.A. 1991).

<sup>345</sup> See MCM, *supra* note 3, MIL. R. EVID. 702; *Daubert v. Merrill Dow Pharmaceutical*, 509 U.S. 579 (1993).

<sup>346</sup> BLACK’S LAW DICTIONARY 813 (17th ed. 1999).

(requiring some level of knowledge) of a known risk. Defense counsel should, therefore, actively seek expert evidence relevant to the accused's possession of mens rea, including general intent, and request appropriately tailored instructions based upon the evidence. Appendix C contains a suggested amendment of *Benchbook* instruction 5-17 that would allow for this type of evidence.

#### V. Evidence Relevant to Voluntary Act (Unconsciousness / Automatism)

Just as evidence negating mens rea may result in a complete acquittal, so may evidence negating the actus reus. Fundamental to the idea of criminal responsibility is that there has been a “concurrence of an evil-meaning mind with an evil-doing hand,”<sup>347</sup> reflected in criminal statutes by the presence of both a proscribed act and an attendant mental state. Under common law, and within the military justice system, the proscribed act must be voluntary.<sup>348</sup> While the previous section focused on evidence of mental illness as it might affect an accused's possession of the prescribed mental state, this section focuses on how mental illness may result in a servicemember committing an involuntary act. The defense associated with the absence of a voluntary act is commonly referred to as either unconsciousness or automatism.<sup>349</sup> Automatism is defined “as connoting the state of a

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<sup>347</sup> *Morissette v. United States*, 342 U.S. 246 (1952).

<sup>348</sup> *Berri*, 33 M.J. at 341 n.9 (“An act is a *voluntary* movement.”).

<sup>349</sup> See LAFAVE, *supra* note 171, at § 9.4. Although the concepts of voluntariness, automatism, and unconsciousness are not equivalent, courts and commentators alike often use them interchangeably. See Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 281 (2002). This paper focuses on whether the absence of a voluntary act, regardless of whether it occurs during an automatic state or a period of unconsciousness, excuses otherwise criminal conduct in the military justice system.

person who, though capable of action, is not conscious of what he is doing.”<sup>350</sup> Examples include actions committed while sleepwalking (somnambulism), while hypnotized, during an epileptic seizure, or following extreme trauma.<sup>351</sup> Although automatism has a firm place within the common law and the general literature on criminal law,<sup>352</sup> its status within the military justice system is uncertain.<sup>353</sup>

This characterization of automatism as negating the actus reas, however, is highly debatable.<sup>354</sup> Some in the legal community argue that automatism is treated more properly as evidence either negating mens rea or as a form of the insanity defense.<sup>355</sup> Those favoring the actus reas analysis point out that automatic behavior is often characterized by the lack of purposeful or willful behavior, such as sleepwalking, and thus occurs in individuals who may

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<sup>350</sup> *Id.* See also BLACK’S LAW DICTIONARY 129 (17th ed. 1999) (defining automatism as “action or conduct occurring without will, purpose, or reasoned intention, such as sleepwalking; behavior carried out in a state of unconsciousness or mental dissociation without full awareness”).

<sup>351</sup> Major Michael J. Davidson, *United States v. Berri: The Automatism Defense Rears Its Ugly Little Head*, ARMY LAW., Oct. 1993, at 19-23.

<sup>352</sup> LAFAVE, *supra* note 171, § 9.4, at 466.

<sup>353</sup> For a comprehensive discussion of the defense of automatism within the military justice system, see Davidson, *supra* note 351, at 17. Major Davidson concludes that automatism, although ill-defined, exists in the military justice system as a challenge to the actus reas that has the potential to result in a complete acquittal. *Id.* at 26.

<sup>354</sup> See Denno, *supra* note 349, at 275; Emily Grant, Note: *While You Were Sleepwalking or Addicted: A Suggested Expansion of the Automatism Doctrine to Include an Addiction Defense*, 2000 U. ILL. L. REV. 997 (2000); Stephen J. Morse, Symposium: *Act & Crime: Acts, Choices & Coercion: Culpability and Control*, 142 U. PA. L. REV. 1587, 1641 n.145 (1994); Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191(1990); Eunice A. Eichelberger, Annotation, *Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R. 4th 1067 (1984).

<sup>355</sup> See Grant, *supra* note 354, at 1001-06 (providing an excellent comparison of automatism to the insanity defense).

not suffer from a severe mental disease or defect at all.<sup>356</sup> The insanity defense, therefore, would not provide an affirmative defense to those individuals, making it underinclusive for the purpose of absolving someone who acts without conscious control of his behavior. The latter school of thought argues that automatic behavior should be included as a form of insanity because, regardless of the cause, individuals who commit dangerous acts outside of their conscious control are no less dangerous to society than the criminally insane.<sup>357</sup> The heightened procedural requirements of the insanity defense, such as pretrial notice, a defense burden of proof, and involuntary commitment, are equally appropriate, it is argued, for cases involving automatism.<sup>358</sup> Obviously, the distinction is both procedurally and substantively significant.<sup>359</sup> If automatism is treated as a means of attacking the government's proof of the elements, whether the actus reus or the mens rea, then the burden of proof never shifts to the accused, and defense success at trial will result in complete acquittal.<sup>360</sup> On the other hand, if automatism is regarded as a specialized form of insanity, then the accused would bear the burden of proof under current rules and success would potentially result in involuntary commitment.<sup>361</sup>

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<sup>356</sup> See *Fulcher v. State*, 633 P.2d 142 (Wyo. 1981) ("Automatism may also be manifest in a person with a perfectly healthy mind.").

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> See *Morse*, *supra* note 354 n.45 (emphasizing the importance of the distinction as it effects the allocation of the burden of proof and the treatment of the defendant following acquittal).

<sup>360</sup> See *In re Winship*, 397 U.S. 358 (1970) (holding that the prosecution must prove all elements of a crime beyond a reasonable doubt). See also *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (holding that the Due Process Clause requires that the prosecution prove each element of mens rea beyond a reasonable doubt).

<sup>361</sup> See *MCM*, *supra* note 3, R.C.M. 916(k)(1), 1102A.

A. History of Unconsciousness (Automatism) in Military Case Law

Although military courts have referred to automatism as a viable defense, the CAAF has not provided a firm definition. One of the earliest military cases to mention automatism is *United States v. Olvera*.<sup>362</sup> In *Olvera*, the issue was whether the law officer erred by failing to give an instruction “on the effect of unconsciousness, or ‘mental blackout,’ on general criminal responsibility.”<sup>363</sup> At trial, Private First Class (PFC) Olvera alleged that he suffered from amnesia at the time of the offense as a result of receiving several blows to the head, a type of trauma known to cause automatic behavior.<sup>364</sup> In its analysis, the court stated that the accused’s head injury could result in acquittal, provided the injury “deprived him of the ability to distinguish right from wrong—as well as to remember the nature of his conduct.”<sup>365</sup> Although the court used the term “automatism” in a number of instances, it did so in the context of the insanity defense, ultimately holding that “the accused signally failed to link his amnesia to any type of automatism, or to demonstrate that the deftly executed slashing of his victim was related in any way to a ‘mental defect, disease or derangement’ depriving him of legal responsibility.”<sup>366</sup> While not conclusive, the *Olvera* opinion seems to

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<sup>362</sup> 15 C.M.R. 134 (C.M.A. 1954).

<sup>363</sup> *Id.* at 136.

<sup>364</sup> *Id.* A medical officer testified at trial that if someone were to receive several blows to the head in the area of the temple, “it is ‘possible that the recipient of such a blow can be so dazed thereby momentarily or longer as to be deprived of any conscious intent to commit a particular act.’” *Id.* The appellant testified at trial that he did receive one or more blows to the head, and that subsequently lost memory of the events. *Id.*

<sup>365</sup> *Id.* at 139.

<sup>366</sup> *Id.* at 140.

support a conclusion that the court treated automatism as a form of insanity.<sup>367</sup> Aside from recognizing the general proposition that unconsciousness at the time of the offense would relieve an accused from criminal responsibility, the *Olvera* opinion is too confused to provide any authoritative guidance on the precise treatment of unconsciousness as a defense.

The most recent COMA case to address the defense of automatism is *United States v. Berri*.<sup>368</sup> In *Berri*, the appellant presented expert testimony that, at the time of the offense, he suffered from post-traumatic stress disorder, dissociative episodes, and paranoid explosive personality disorder.<sup>369</sup> Although automatism was not directly raised as an issue, the court

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<sup>367</sup> The court made other comments to support this conclusion. For example, citing *People v. Freeman*, 142 P.2d 435 (Cal. 1943), the *Olvera* court stated that if the accused were able to demonstrate that a “blackout” stemmed from acute epilepsy, they would have no trouble concluding that the defense of mental responsibility had been raised. This statement, however, is unsupported by the opinion in *Freeman*, which states that unconsciousness, when caused by epilepsy, “differs from insanity in that the latter generally meant an unsoundness of mental condition which modifies, or removes, individual responsibility because it ‘is such a deprivation of reason that the subject is incapable of understanding and of acting with discretion in the ordinary affairs of life.’” *Id.* at 438. The *Freeman* court went on to hold that the defendant is not required to plead insanity in order to raise a defense of unconsciousness. *Id.* at 439. *Freeman*, therefore, does not support the proposition that a blackout resulting from an epileptic seizure would raise the insanity defense.

<sup>368</sup> 33 M.J. 337 (1991). The Army Court of Military Review has, in two relatively recent decisions, reviewed cases involving evidence of automatic behavior but failed to define the defense of automatism. In *United States v. Campos*, 37 M.J. 894 (A.C.M.R. 1993), the court rejected the appellant’s assertion that “he lacked the required mens rea due to automatic and uncontrollable behavior brought on by claustrophobia.” *Id.* at 901. Without ever deciding whether automatic behavior rebuts the actus reus, the mens rea, or supports an insanity defense, the court held simply that “we agree with the government and find the appellant’s contention to be without merit.” *Id.* at 902. The government’s argument, as described by the court, was that the military judge, in a bench trial, “was not persuaded that the appellant’s evidence about his lack of mental responsibility negated any intent elements of the offenses.” This language further confuses the question of whether the military judge found the evidence relevant to the government’s proof of mens rea, the accused’s proof of an insanity defense, or perhaps both. The legal standard applied in *Campos*—whether the evidence was legally and factually sufficient to support the findings—could not be applied logically to the case without first determining the issues to which the evidence was relevant, i.e. government proof of actus reus and mens rea, or defense proof of insanity, in conjunction with the allocation of the burden of proof. Because the court’s analysis does not include a discussion of the legal relevance of the evidence, the holding does not resolve any of the key issues regarding the applicability of automatism. See also *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992) (holding that the evidence established beyond a reasonable doubt that the accused was mentally responsible at the time of the offenses, in part because the defense evidence that the accused suffered from “temporal lobe epilepsy” and “automatous behavior” lacked credibility).

<sup>369</sup> 33 M.J. at 338.

noted that one of the defense's experts testified about the accused's level of consciousness at the time of the offense. Without citing to *Olvera*, or any other judicial decision, the court acknowledged in a footnote that unconsciousness could be raised as a defense.<sup>370</sup> In the same footnote, the court recognized that while the common law and the Model Penal Code treat consciousness as part of the actus reus, some jurisdictions instead regard it as an affirmative defense.<sup>371</sup> Having noted the existence of unconsciousness as a defense, the court concluded that insufficient evidence had been raised in the case to actually define its status under military law.<sup>372</sup> The court's resolution of the issue is largely unsatisfying. Logically, one would need to know the definition of the defense before determining whether it has been raised by the evidence; nonetheless, the court declined to elaborate on the legal relevance of the accused's consciousness.

Although the military appellate courts have declined to provide any clear guidance on the defense of unconsciousness, at least one federal appeals court has directly addressed the issue. In *Government of the Virgin Islands v. Smith*,<sup>373</sup> the Third Circuit heard an appeal of a district court conviction for involuntary manslaughter.<sup>374</sup> At trial, the appellant presented expert testimony that he suffered an epileptic seizure at the time he lost control of his vehicle,

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<sup>370</sup> *Id.* at 341 n.9.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 341.

<sup>373</sup> 278 F.2d 169 (3d Cir. 1960).

<sup>374</sup> *Id.* at 171.

striking and killing two women.<sup>375</sup> The court reversed the conviction, holding that the trial judge had improperly placed the burden of proof upon the accused.<sup>376</sup> According to the court, the accused's only burden at trial was to raise a reasonable doubt as to his consciousness at the time of the offense, after which the government was required to prove each element of the offense beyond a reasonable doubt.<sup>377</sup> Interestingly, the court characterized the appellant's lack of consciousness as negating his possession of mens rea, rather than his commission of a voluntary act.<sup>378</sup> In dicta, the court further noted that the *M'Naghten* Rule for insanity was in effect in that jurisdiction, but that the evidence of unconsciousness due to an epileptic seizure did not amount to a mental illness.<sup>379</sup> The *Smith* opinion is of particular importance to the military defense counsel because it is the only appellate decision interpreting the defense of unconsciousness under federal law.<sup>380</sup> Even if

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 173.

<sup>377</sup> *Id.* at 173-74. The Third Circuit cites the same line of California cases cited by the COMA in *United States v. Olvera*, including *United States v. Freeman*, 142 P.2d 435 (Cal. 1943). *Id.* at 175. See *supra* note 367 discussing the COMA's erroneous interpretation of *Freeman*.

<sup>378</sup> *Id.* at 174.

<sup>379</sup> *Id.*

<sup>380</sup> Although there are other federal decisions that mention the defense of unconsciousness, none define the defense as it exists under federal law or prescribe any protections afforded by the Fifth or Sixth Amendment. One example is *Williams v. Gupton*, 627 F. Supp. 669 (W.D.N.C. 1986), a case in which the petitioner alleged that his conviction in state court violated the Due Process Clause because the trial court had placed the burden upon the defense to prove automatism rather than requiring the state to disprove the defense beyond a reasonable doubt. *Id.* at 670. Although the district court cited two state court decisions distinguishing automatism from the insanity defense, the court denied the appellant's petition for a writ of habeas corpus because he had failed to preserve the issue both at trial and on direct appeal. *Id.* at 671.

the *Smith* court's analysis is not controlling on the status of unconsciousness under military law, it certainly has persuasive value that can be argued by defense counsel.<sup>381</sup>

B. A Proposed Instruction for Evidence of an Involuntary Act

The good news for defense counsel is that the current ambiguity in the defense of automatism leaves much room for advocacy. The *Berri* decision, by failing to cite the court's decision in *Olvera* and seemingly giving greater weight to the common law and the Model Penal Code, seems to emphasize the practice of treating consciousness as part of the actus reas. From the accused's perspective, a defense on the elements, whether it be the actus reas or the mens rea, is nearly always preferable to the insanity defense because the accused need only raise a reasonable doubt to secure an acquittal.<sup>382</sup> Furthermore, if evidence of automatism is treated as negating the government's proof of either a voluntary act or a required mental state, then it must be regarded as a rule of relevance, much like evidence negating mens rea.<sup>383</sup> This categorization has the great advantage, for the defense, of limiting the ability of either Congress or the President to restrict its scope and applicability without infringing upon the accused's constitutional right to present a defense.<sup>384</sup> Defense

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<sup>381</sup> See *United States v. Frederick*, 3 M.J. 230 (1977) (looking to federal criminal law for definition of the insanity defense when UCMJ provided no specific provision).

<sup>382</sup> See *In re Winship*, 397 U.S. 358 (1970). Cf. *Williams v. Gupton*, 627 F. Supp. 669 (W.D.N.C. 1986) (noting that the Fifth Amendment does not preclude states from placing the burden of proof upon the defendant to prove affirmative defenses); *North Carolina v. Jones*, 595 S.E.2d 715 (N.C. 2004) (finding that unconsciousness is a complete defense, separate and apart from insanity, for which the accused has the burden of proof).

<sup>383</sup> See *supra* Part IV.

<sup>384</sup> See, e.g., *Rock v. Arizona*, 483 U.S. 44 (1987) (holding that the defendant's rights under the Fifth and Sixth Amendments were violated by a state evidentiary rule prohibiting the introduction of hypnotically refreshed testimony). Cf. *Medina v. California*, 505 U.S. 437 (1992) (holding that the Due Process Clause does not

counsel, therefore, should strenuously argue that evidence of automatic behavior is not governed by the strict definition for lack of mental responsibility found in RCM 916(k)(1), and that the accused is entitled to a carefully tailored panel instruction appropriate to the evidence presented.

Unlike the defense of lack of mental responsibility and the use of evidence negating mens rea, the *Benchbook* does not contain an instruction applicable to evidence negating the government's proof of a voluntary act. Thus, a completely new instruction, titled "5-15a. Evidence Negating Voluntary Act," is proposed in Appendix D.<sup>385</sup> Although the language of the instruction will vary depending upon the nature of the charges and the evidence, the key point is that the factfinder must understand that the government must prove beyond a reasonable doubt that the actions of the accused were voluntary.

## VI. Evidence Offered in Mitigation or Extenuation

Finally, evidence that the accused suffered from a mental illness, whether prior to, during, or after the commission of an offense, is often relevant as mitigation or

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prohibit a state from placing the burden of proof on the defendant to prove mental incompetence); *Patterson v. New York*, 432 U.S. 197 (1977) (holding that it is not unconstitutional to require the defendant to prove affirmative defenses).

<sup>385</sup> In *United States v. Mallery*, a case tried in December 2003, detailed defense counsel, MAJ Patrick Gary, requested a similar panel instruction after presenting evidence that the accused was sleepwalking at the time of the offense. The military judge agreed to give the requested instruction, and the panel returned a verdict of not guilty. This case has not been reviewed on appeal.

extenuation.<sup>386</sup> Extenuating evidence is that which “serves to explain the circumstances surrounding the commission of the offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.”<sup>387</sup> Evidence in extenuation is often backward looking, focusing on mental illness that existed prior to or contemporaneously with the offenses, potentially lessening the accused’s culpability. Mitigating evidence, on the other hand, serves “to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency.”<sup>388</sup> In contrast to extenuating evidence, mitigating evidence is generally forward looking, focusing on how the purposes for punishment can best be accomplished, taking into consideration the mental health of a particular accused.

Because mental illness is inherently related to human behavior, evidence that the accused suffered a mental illness may either explain the accused’s commission of the offense or weigh in favor of a more lenient punishment. For example, in a case where the accused’s mental illness contributed to his motivation to commit an offense, evidence that the illness is treatable, coupled with a favorable prognosis, will be persuasive in contradicting a prosecution argument that criminal punishment is necessary to accomplish specific deterrence or rehabilitation.<sup>389</sup> On the other hand, if the accused is diagnosed with a mental

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<sup>386</sup> MCM, *supra* note 3, R.C.M. 1001(c)(1) (“The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.”).

<sup>387</sup> *Id.* R.C.M. 1001(c)(1)(A).

<sup>388</sup> *Id.* R.C.M. 1001(c)(1)(B).

<sup>389</sup> A more specific example that seems to arise with some frequency is the case in which the accused’s decision to commit the offense was influenced by acute anxiety or depression. In this circumstance, expert

disorder that is difficult or impossible to treat, such as an inadequate personality<sup>390</sup> or pedophilia,<sup>391</sup> then evidence of the disorder would logically not result in a reduced sentence. The point for defense counsel to remember is that evidence of mental illness, including relatively minor disorders, may have relevance to punishment that is completely distinct from relevance to mental capacity, mental responsibility, and other issues that arise in the case on the merits. What makes the evidence persuasive, as either mitigation or extenuation, is the defense counsel's ability to: (1) use the mental disorder to provide insight into the accused's motivation or compulsion to commit criminal acts; (2) establish that the disorder is treatable and that the accused has the characteristics that make him a good candidate for successful treatment; (3) shift the focus of the factfinder from retribution to rehabilitation; and (4) allow the accused, either through a sworn or unsworn statement, to convince the factfinder that he is committed to receiving all necessary treatment.

The importance of the defense counsel's duty to investigate and present evidence in mitigation and extenuation, including evidence of mental illness, is illustrated by *United States v. Kreutzer*.<sup>392</sup> After finding SGT Kreutzer guilty of premeditated murder, along with

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testimony that the depression can be successfully treated, either through therapy or medication, could serve to reduce the sentence. In the author's experience, military judges have widely disparate views on the significance of this type of evidence; however, it is probably beyond cavil that presenting this type of extenuation is far better than presenting no extenuation at all.

<sup>390</sup> Inadequate personality is defined as a disorder "characterized by ineptness and emotional and physical instability, which renders the individual unable to cope with the normal vicissitudes of life." *STEDMAN'S MEDICAL DICTIONARY* 1172 (25th ed. 1990).

<sup>391</sup> Pedophilia is defined as "the love of children by an adult for sexual purposes." *Id.* at 1044.

<sup>392</sup> 59 M.J. 773 (2004).

other offenses, a general court-martial sentenced him to death.<sup>393</sup> At trial, the defense team requested the assistance of a mitigation expert to gather evidence for use during presentencing, including evidence relevant to the accused's documented psychological problems.<sup>394</sup> Both the general court-martial convening authority and the military judge denied the request.<sup>395</sup> The Army Court of Criminal Appeals ruled that the military judge had abused his discretion, and that the lack of a mitigation expert contributed to the defense team's ineffectiveness during presentencing.<sup>396</sup> Underlying the court's decision was that the accused's mental state was central to the case, both on the merits and during presentencing.<sup>397</sup> Not only had the accused been evaluated and diagnosed by several mental health professionals, but one even noted that "mitigating mental health evidence concerning appellant would be central to any defense."<sup>398</sup> As a result of the government's failure to provide adequate expert assistance to the defense for the purpose of discovering and presenting mitigating evidence of the accused's mental health, the court reversed the findings on premeditated murder, set aside the sentence, and remanded the case for further proceedings.<sup>399</sup> The message from *Kreutzer* is fairly clear. In a capital case, the defense

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<sup>393</sup> *Id.* at 774.

<sup>394</sup> *Id.* at 777. As noted by the court, a mitigation specialist would have done an extensive background search of the accused for the purpose of discovering "significant contributing events or factors in [appellant's] life that may have effected [sic] his mental health at the time of the offenses charged." *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 774-75.

<sup>397</sup> *Id.* at 777.

<sup>398</sup> *Id.* at 777.

<sup>399</sup> *Id.* at 784. The remedy imposed by the court was also based upon the ineffective assistance of defense counsel.

counsel has a heightened duty to present mitigating evidence of mental illness and the government has an obligation to provide reasonable expert assistance to gather that evidence.

Although the *Kreutzer* decision is specific to capital litigation, the Army Court has imposed a similar duty on defense counsel acting in noncapital cases. In *United States v. Weathersby*,<sup>400</sup> a military judge sitting alone found the appellant guilty of attempted forcible sodomy, rape, and assault of his daughter.<sup>401</sup> Following the government's presentencing case, the defense called the appellant for a sworn statement that consisted of approximately fifty-four words, after which the defense rested without presenting any other evidence.<sup>402</sup> The military judge sentenced the accused to confinement for twenty-six years, a dishonorable discharge, total forfeiture of pay and allowances, and reduction to private E-1.<sup>403</sup> While accepting the defense counsel's assertions that the appellant had failed to cooperate in either identifying potential defense witnesses or providing documentary evidence, the court still held that the defense counsel's performance during presentencing amounted to ineffective assistance of counsel.<sup>404</sup>

Although the *Weathersby* case did not involve extenuating or mitigating evidence of mental illness, the court's decision applies equally to the defense counsel's duty to discover

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<sup>400</sup> 48 M.J. 668 (Army Ct. Crim. App. 1998).

<sup>401</sup> *Id.* at 669.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at 671.

## VII. Conclusion

Although the issues in this paper are addressed predominantly from the perspective of a trial defense counsel, the legal analysis and conclusions are intended to be a balanced interpretation of the law as it exists today. The purpose of this paper has been to identify those areas of military law relevant to mentally ill servicemembers that are most in need of revision and clarification. In general, the effectiveness of law is lessened by ambiguity and strengthened by certainty and predictability. For this reason, the military justice system as a whole will benefit from correcting the deficiencies addressed in this paper.

The first of those deficiencies is found in R.C.M. 909, which allows the general court-martial convening authority, with the assistance of the Attorney General, to involuntarily hospitalize a servicemember prior to referral of charges. These provisions of R.C.M. 909 are unlawful for two reasons: (1) because the statute upon which R.C.M. 909 is based, Article 76(b), UCMJ, only applies to cases in which charges have been referred, and (2) because involuntary commitment is accomplished without ever giving the servicemember a hearing in front of a neutral decisionmaker, violating the Due Process Clause. Consequently, R.C.M. 909 must be amended as shown in Appendix A to prevent involuntary commitment of a servicemember prior to referral of charges and to restore the convening authority's discretion to dispose of charges as he sees fit.<sup>409</sup>

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<sup>409</sup> The amendment recommended in Appendix A naturally raises difficult questions. What should a convening authority do with a mentally incompetent servicemember who is suspected of committing serious crimes? May an Article 32, UCMJ, investigation proceed against an accused servicemember who is mentally incompetent? Does the accused have a statutory or constitutional right to be mentally competent at the time of an Article 32,

For cases that have been referred to trial, there is significant ambiguity in the insanity defense, the doctrine of partial mental responsibility, and the defense of unconsciousness. Within the law of mental responsibility, the *Military Judges' Benchbook* defines "severe mental disease or defect" too narrowly. Instruction 6-4 excludes "non psychotic behavior disorders and personality disorders" from the definition of "severe." This exclusionary language is unsupported by Article 50a, UCMJ, and is arguably contrary to military case law. Furthermore, Instruction 6-4 should be improved by defining the key terms of the mental responsibility defense, including "appreciate," "nature and quality," and "wrongfulness." These three terms must be defined in a way that captures two important principles. First, the accused must have more than a cognitive awareness of the circumstances surrounding an alleged offense—he must have an emotional awareness of the significance of his actions and their natural consequences. Second, the accused's actions, as he appreciates them, must be more than merely unlawful—wrongfulness must include an element of public morality. Although these two principles may be articulated in different ways, one possible solution is found in Appendix B.

While the insanity defense may be significantly improved merely by defining its key terms, the doctrine of partial mental responsibility must undergo a complete transformation in the way it is presented in the *Military Judges' Benchbook*. The Military Justice Amendments of 1986, along with a recent amendment of RCM 916(k)(2), abolished what

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UCMJ, investigation? Is it permissible for a convening authority to refer charges to court-martial for an accused servicemember whom he believes to be mentally incompetent? These questions, although admittedly important, are beyond the scope of this paper. The purpose of this paper has been to identify the statutory and constitutional deficiencies in R.C.M. 909 that demand its amendment. The answers to the difficult questions posed above will be important in shaping more holistic changes to the UCMJ and the Manual for Courts-Martial to deal with mentally ill servicemembers.

was previously known as the doctrine of partial mental responsibility. Nevertheless, evidence of the accused's mental illness may still be relevant to whether or not he possessed a criminal mens rea at the time of the offenses. The distinction between the doctrine of partial mental responsibility and the use of evidence to negate mens rea is significant. The doctrine of partial mental responsibility, as reflected in *Benchbook* Instructions 5-17 and 6-5, provided a defense when the accused raised a reasonable doubt about his mental *capacity* to entertain the mens rea required by the charged offense. Reference to the accused's mental *capacity* to form a specific mens rea is a vestige of the doctrine that both Congress and the President have abolished. In contrast, the legal relevance of evidence of mental illness used to negate mens rea is whether the accused's mental illness makes it more or less likely that he possessed the mens rea required by the charged offense. Stated more simply, the relevant issue is not the accused's mental capacity to form mens rea—the relevant issue is whether the accused actually possessed a criminal mens rea. This paper proposes a revised *Benchbook* instruction that removes all remnants of the abolished doctrine of partial mental responsibility and clarifies the relevance of the accused's mental illness to the government's proof of mens rea.

Finally, the accused may present evidence of mental illness to demonstrate that his or her actions were involuntary. Commonly referred to as the defense of unconsciousness, or automatism, or as a failure of the government's proof that the accused committed a voluntary act, neither the *Manual for Courts-Martial* nor the *Military Judges' Benchbook* contains a provision defining the defense. Evidence that the accused's actions were involuntary, whether characterized as negating the mens rea or the actus reus, undermines the

government's proof of the elements. Because military law requires that the actions of an accused servicemember be voluntary to support a court-martial conviction, the accused should be entitled to a specific panel instruction when the evidence raises the issue of whether mental illness may have resulted in the accused's actions being involuntary. Appendix D contains a new panel instruction to be given when there is evidence that the accused's actions were involuntary.

The clarifications and revisions suggested in this paper may be effected in a number of ways. Although I have suggested that defense counsel bring about many of the changes by challenging the legal sufficiency of current provisions in court, such an approach is certainly not required. As stated earlier, all parties involved in the military justice system, including the convening authority, the staff judge advocate, the trial counsel, and the military judge, have an independent interest in seeing that justice is served and that the law is effective in accomplishing its purpose. Ultimately, it is irrelevant whether the changes proposed in this paper favor either the government or the accused in an individual case. What is important is that the interests of justice are served, which requires certainty and predictability in the law as it applies to mentally ill servicemembers.

## Appendix A – RCM 909 Involuntary Commitment Amendments

### Proposed Amendments to RCM 909

#### Rule 909. Capacity of the accused to stand trial by court-martial

(a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against ~~them~~ him or her or to conduct or cooperate intelligently in the defense of the case.

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may ~~disagree with the conclusion and~~ take any action authorized under R.C.M. 401, including referral of the charges to trial. ~~If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, u~~Upon receipt of the charges, the general court-martial convening authority ~~similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with~~ R.C.M. 407, including referral of the charges to trial.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either sua sponte or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraphs (e) and (f) of this rule.

#### (e) Procedures applicable during hearings.

(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.

(2) The military judge is not bound by the rules of evidence except with respect to privileges.

#### (f) Incompetence determination hearing.

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. ~~In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.~~

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall take action in accordance with paragraph (g) of this rule ~~commit the accused to the custody of the Attorney General.~~

(g) Hospitalization of the accused.

(1) Upon receipt of a report from the military judge finding the accused incompetent to stand trial, the general court-martial convening may withdraw the charges from the court-martial, dismiss the charges without prejudice to the government, or commit the accused who is found incompetent to stand trial under this rule shall be hospitalized by to the custody of the Attorney General as provided in section 876b(a)(1) 4241(d) of title 108, United States Code.

(2) If, following hospitalization by the Attorney General as provided in section 4241(d) of title 18, United States Code, the general-court martial convening authority receives notification is notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. The military judge shall conduct a hearing in accordance with paragraphs (e) and (f) of this rule to determine the mental capacity of the accused before proceeding to trial.

(3) If, at the end of the period of hospitalization, the accused's mental condition has not so improved, then the general court-martial convening authority shall promptly take custody of the accused and order the military judge to conduct a hearing in accordance with paragraphs (e) and (h) of this rule. action shall be taken in accordance with section 4246 of title 18, United States Code.

(h) Dangerousness determination hearing.

(1) *Nature of issue.* The dangerousness of the accused is an interlocutory question of fact.

(2) *Presumption.* A person is presumed not to be dangerous unless the contrary is established.

(3) *Standard.* The accused must be released unless it is established by clear and convincing evidence that the accused is presently suffering from a mental disease or defect as

a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(4) If, after the hearing, the military judge finds that the government has satisfied the standard specified in subsection (3) of this paragraph, the military judge shall inform the general court-martial convening authority of this result and that authority, if he or she concurs, may withdraw the charges from the court-martial, dismiss the charges without prejudice to the government, or commit the accused to the custody of the Attorney General as provided in section 4246(d) of title 18, United States Code. If, however, the military judge finds after the hearing that the government has not satisfied the standard specified in subsection (3) of this paragraph, the military judge shall inform the general court-martial convening authority of this result and the accused shall be released.

## Appendix B – Instruction 6-4 Mental Responsibility Amendments

### Proposed Amendments to Benchbook Instruction 6-4

#### 6-4. MENTAL RESPONSIBILITY AT TIME OF OFFENSE

**NOTE 1:** *Using these instructions.* Lack of mental responsibility (insanity) at the time of the offense is an affirmative defense which must be instructed upon, *sua sponte*, when the military judge presents final instructions. These instructions may be modified for use as preliminary instructions. See Instruction 6-3, *Preliminary Instructions on Sanity*. The following instruction is suggested:

**MJ:** The evidence in this case raises the issue of whether the accused lacked criminal responsibility for the offense(s) of (*state the alleged offense(s)*) as a result of a severe mental disease or defect. (In this regard, the accused (himself) (herself) has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense(s) of (*state the alleged offense(s)*). In other words, you should vote first on whether the Government has proved beyond a reasonable doubt each essential element of the offense(s). Unless at least two-thirds of the members, that is \_\_\_\_\_ members, find that each element has been proved, you should return a finding of NOT GUILTY (as to that specification) and you need not consider the issue of mental responsibility.

If, however, two-thirds of the members are convinced beyond reasonable doubt that the accused did the act(s) charged (in (the) Specification (\_\_\_\_) of (the) (additional) Charge) (or committed a lesser included offense), then you must decide whether the accused was mentally responsible for the offense(s) (*state the alleged offense(s)*).

This will require a second vote, and each member must vote, regardless of your vote on the elements.

**NOTE 2:** *When a sanity determination might be required in spite of a NOT GUILTY finding.* It is possible to acquit of a greater offense and then find the accused NOT GUILTY only by reason of Lack of Mental Responsibility. Tailor instructions accordingly.

**MJ:** The accused is presumed to be mentally responsible. This presumption continues throughout the proceedings until you determine, by clear and convincing evidence, that (he) (she) was not mentally responsible. Note that, while the Government has the burden of proving the elements of the offense(s) beyond a reasonable doubt, the defense has the burden of proving by clear and convincing evidence that the accused was not mentally responsible.

As the finders of fact in this case, you must first decide whether, at the time of the offense(s) of *(state the alleged offense(s))*, the accused actually suffered from a severe mental disease or defect. The term severe mental disease or defect can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct ~~or by non-psychotic behavior disorders and personality disorders~~. If the accused at the time of the offense(s) of *(state the alleged offense(s))* was not suffering from a severe mental disease or defect, (he) (she) has no defense of lack of mental responsibility.

If you determine that, at the time of the offense(s) of *(state the alleged offense(s))*, the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct.

To appreciate the nature and quality of (his) (her) conduct, the accused must have knowledge that (he) (she) has engaged in the conduct, and an awareness of the legal and moral import of the conduct's natural consequences.

To appreciate the wrongfulness of (his) (her) conduct, the accused must have an emotional awareness that the conduct is contrary to the accepted moral standards of society.

If the accused was able to appreciate both the nature and quality, and ~~or~~<sup>410</sup> the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible; and this is so regardless of whether the accused was then suffering from a severe mental disease or defect, (and regardless of whether (his) (her) own personal moral code was not violated by the commission of the offense(s)).

(On the other hand, if the accused had a delusion of such a nature that (he) (she) was unable to appreciate the nature and quality or wrongfulness of (his) (her) acts, the accused cannot be held criminally responsible for (his) (her) acts, provided such a delusion resulted from a severe mental disease or defect.)

**MJ:** To summarize, you must first determine whether the accused, at the time of (this) (these) offense(s), suffered from a severe mental disease or defect. If you are convinced by clear and convincing evidence that the accused did suffer from a severe mental disease or defect, then you must further consider whether (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) conduct. If you are convinced by clear and convincing evidence that the accused suffered from a severe mental disease or defect, and you are also convinced by clear and convincing evidence that (he) (she) was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct, then you must find the accused not guilty only by reason of lack of mental responsibility. ~~On the other hand, you may not acquit the accused on the ground of lack of mental responsibility, absent the accused~~

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<sup>410</sup> The change in this paragraph corrects an apparent mistake in the original drafting of this instruction. As corrected, the paragraph correctly reflects the fact that the legal standard is disjunctive from the perspective of the accused, but conjunctive from the perspective of the government.

~~suffering from a severe mental disease or defect, or if you believe that (he) (she) was able to appreciate the nature and quality and wrongfulness of (his) (her) conduct.~~<sup>411</sup> Applying these principles to the accused's burden of establishing a lack of mental responsibility by clear and convincing evidence, you are finally advised that the accused, in order to be acquitted on the basis of lack of mental responsibility, is required to prove, by clear and convincing evidence, that the accused was not mentally responsible at the time of the offense(s). By clear and convincing evidence I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirements of clear and convincing evidence does not call for unanswerable or conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence. The facts to which the witnesses have testified must be distinctly remembered and the witnesses themselves found to be credible. In deliberating on this issue, you should consider all the evidence, including that from experts (and laypersons), as well as your common sense, your knowledge of human nature, and the general experience of mankind that most people are mentally responsible.

**NOTE 3: *Other instructions.* See Instruction 6-5 for additional instructions which are frequently applicable when insanity is in issue.**

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<sup>411</sup> Although the deleted language in this paragraph is legally correct, it is an unnecessary restatement of the fact that the burden of proof is on the accused to prove lack of mental responsibility. As it stands, the deleted sentence is somewhat confusing, and adds no additional information for the panel. This change is meant to make the instruction more understandable from the perspective of the panel, rather than as a means of advocacy for the defense.

## Appendix C – Evidence Negating Mens Rea Amendments

### Proposed Amendment to Benchbook Instruction 5-17

#### 5-17. EVIDENCE NEGATING MENS REA

**NOTE 1: *Relationship between this instruction and the defense of lack of mental responsibility under Article 50a and RCM 916(k).*** Notwithstanding RCM 916(k)(1) and (2), evidence of a mental disease, defect, or condition is admissible if it is relevant to the elements of the offenses charged, ~~premeditation, specific intent, knowledge, or willfulness~~. *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988); *United States v. Berri*, 33 M.J. 337 (C.M.A. 1991).

**NOTE 2: *When to use this instruction.*** ~~DO NOT use this instruction if the evidence has raised the defense of lack of mental responsibility. If the defense of lack of mental responsibility has been raised, use the instructions in Chapter 6 including, if applicable, Instruction 6-5, *Partial Mental Responsibility*.~~ Use the instructions below when ~~premeditation, specific intent, willfulness, or knowledge is an element of an offense, and~~ there is evidence tending to establish a mental or emotional condition of any kind, which, although not amounting to lack of mental responsibility, may negate the mens rea element. The military judge has a *sua sponte* duty to instruct on this issue. When such evidence has been admitted, the following should be given:

The evidence in this case has raised an issue whether the accused had a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (\_\_\_\_\_) that may have affected (his) (her) formation or possession of ~~and the~~ required state of mind with respect to the offense(s) of (*state the alleged offense(s)*).

You must consider all the relevant facts and circumstances (including but not limited to (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides, to include any expert evidence admitted*)).

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to \_\_\_\_\_) (that the accused knew that \_\_\_\_\_) (that the accused's acts were willful (as opposed to only negligent)) (that the accused deliberately disregarded a known risk) (\_\_\_\_\_).

An accused, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (\_\_\_\_\_), may be less likely to ~~incapable of~~ (entertain ~~entertaining~~ (the premeditated design to kill) (possesses specific intent to

\_\_\_\_\_) (~~have~~ having the knowledge that \_\_\_\_\_) (~~act~~ acting willfully) (\_\_\_\_\_).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (\_\_\_\_\_) that affected (his) (her) formation or possession of the mens rea necessary to be guilty of the offense. of such consequence and degree as to deprive (him) (her) of the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to \_\_\_\_\_) (know that \_\_\_\_\_) (\_\_\_\_\_).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offense(s) ~~was mentally capable of (entertained entertaining~~ (the premeditated design to kill) (possessed a specific intent to \_\_\_\_\_) (~~knew~~ knowing that \_\_\_\_\_) (~~acted~~ acting willfully in \_\_\_\_\_) (\_\_\_\_\_), you must find the accused not guilty of (that) (those) offense(s).

**NOTE 3: *Distinguishing mens rea negating evidence and a lack of mental responsibility defense.* If there is a need to explain that mens rea negating evidence should not be confused with the defense of lack of mental responsibility (Article 50a), the following may be given:**

This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his) (her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the government has proven beyond a reasonable doubt that the accused ~~had the ability to~~ (acted willfully) (entertained the (premeditated design to kill) (possessed a specific intent to \_\_\_\_\_) (~~knew~~ know that \_\_\_\_\_) (\_\_\_\_\_).)

**NOTE 4: *Expert witnesses.* When there has been expert testimony on the issue, Instruction 7-9, *Expert Testimony* should be given.**

**NOTE 5: *Evaluating testimony.* Evidence supporting or refuting the existence of mens rea negating evidence may be clear and the members may not need any special instructions on how the evidence should be evaluated. If additional instructions may be helpful in evaluating the evidence, the following may be given:**

You may consider evidence of the accused's mental condition before and after the alleged offense(s) of (*state the alleged offense(s)*), as well as evidence as to the accused's mental condition on the date of the alleged offense. The evidence as to the accused's condition before and after the alleged offense was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense(s).

(You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (\_\_\_\_\_) who testified as expert witnesses. An expert in a particular field is permitted to give (his) (her) opinion. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions. Whether the accused had a (mental condition) (\_\_\_\_\_) and the effect, if any, that (condition) (\_\_\_\_\_) had on the accused, must be determined by you.)

(There was (also) testimony of lay witnesses with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observations and knowledge, the basis for the witness' opinion and conclusions, and the time of their observations in relation to the time of the offense(s) charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

(You are not bound by the opinions of (either) (expert) (or) (lay) witness(es). You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.)

**~~NOTE 6: Lesser included offenses. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the military judge may explain that the mens rea negating evidence instruction is inapplicable. The following may be helpful:~~**

Remember that ~~(state the lesser included offense raised)~~ is a lesser included offense of ~~(state the alleged offense(s))~~. This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to \_\_\_\_\_) (knew that \_\_\_\_\_) (willfully \_\_\_\_\_) (\_\_\_\_\_). In this regard, the instructions I just gave you with respect to the accused's mental ability to (premeditate) (know) (form the specific intent) (act willfully) (\_\_\_\_\_) do not apply to the lesser included offense of ~~(state the lesser included offense raised)~~.

## Appendix D – Instruction for Evidence Negating a Voluntary Act

### Proposed Benchbook Instructions 5-17a

#### 5-17a. EVIDENCE NEGATING VOLUNTARY ACT

**NOTE 1:** *Use the instruction below when there is evidence tending to establish that, due to a mental or medical condition existing at the time of the offense, the accused's actions may not have been voluntary. Evidence of this nature generally arises in circumstances involving somnambulism (sleepwalking), epileptic seizures, hypnotic states, organic brain disease, or extreme trauma. United States v. Berri, 33 M.J. 337 (C.M.A. 1991); Government of the Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960).*

The evidence in this case has raised an issue whether the acts alleged in (*state the alleged offense(s)*) were committed voluntarily. An accused may not be held criminally liable for his actions unless they are voluntary. If the accused, due to a (mental (disease) (defect) (impairment) (condition) (deficiency)) (medical condition) was (unconscious) (acting automatically) (incapable of acting voluntarily) at the time of the offense(s), then his actions were involuntary, and he may not be found guilty of the offense(s) prohibiting (that) (those) act(s).

You must consider all the relevant facts and circumstances (including but not limited to (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides, to include any expert evidence admitted*)).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (medical condition) resulting in his (unconsciousness) (automatic behavior) (inability to act voluntarily) at the time of the offense(s).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s) acted voluntarily, you must find the accused not guilty of (that) (those) offense(s).

**NOTE 2: *Distinguishing evidence negating voluntary act and a lack of mental responsibility defense.* If there is a need to explain that evidence negating voluntary act should not be confused with the defense of lack of mental responsibility (Article 50a), the following may be given:**

This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his) (her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the government has proven beyond a reasonable doubt that the accused acted voluntarily).

**NOTE 3: *Expert witnesses.* When there has been expert testimony on the issue, Instruction 7-9, *Expert Testimony* should be given.**

**NOTE 4: *Evaluating testimony.* Evidence supporting or refuting the existence of mens rea negating evidence may be clear and the members may not need any special instructions on how the evidence should be evaluated. If additional instructions may be helpful in evaluating the evidence, the following may be given:**

You may consider evidence of the accused's (mental) (medical) condition before and after the alleged offense(s) of (*state the alleged offense(s)*), as well as evidence as to the accused's (mental) (medical) condition on the date of the alleged offense. The evidence as to the accused's condition before and after the alleged offense was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense(s).

(You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (physicians) (\_\_\_\_\_) who testified as expert witnesses. An expert in a particular field is permitted to give (his) (her) opinion. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions. Whether the accused had a ((mental)(medica) condition) (\_\_\_\_\_) and the effect, if any, that (condition) (\_\_\_\_\_) had on the accused, must be determined by you.)

(There was (also) testimony of lay witnesses with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observations and knowledge, the basis for the witness' opinion and conclusions, and the time of their observations in relation to the time of the offense(s) charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the accused and the nature and length of

time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

(You are not bound by the opinions of (either) (expert) (or) (lay) witness(es). You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.)